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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

NEW BREED LEASING CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Labor Relations Board has the authority to require a successor employer to forfeit its right to establish the initial terms and conditions of employment, and to impose on the successor the substantive terms of a predecessor's collective bargaining agreement as remedies for unfair labor practices, contrary to *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 281-82 (1972), and *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 102 (1970).

STATEMENT REQUIRED BY RULE 29.6

New Breed Leasing Corporation has neither a parent company nor non-wholly owned subsidiaries.

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OPINIONS BELOW

Petitioner New Breed Leasing Corporation ("New Breed") seeks review of a decision of the United States Court of Appeals for the Ninth Circuit enforcing a decision and order of the National Labor Relations Board (the "Board") which, with the dissenting opinion, is reported as *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460 (9th Cir. 1997), and is reproduced in the appendix to this petition (App. 1-27). The Board's decision and order, which includes the decision of the administrative law judge, is reported as *New Breed Leasing Corp.*, 317 N.L.R.B. 1011 (1995), and is reproduced in the appendix (App. 28-128). The opinion of the court of appeals affirming the district court's entry of an interim injunction pending the Board's adjudication is available on Westlaw, *Aguayo* v. *New Breed Leasing Corp.*, No. 94-56215, 1995 WL 7506 (9th Cir. Jan. 6, 1995), and also is reproduced in the appendix (App. 129-31). The district court's interim injunction order is also reproduced in the appendix (App. 132-36).

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Sections 8(a)(1), 8(a)(3), 8(a)(5), 8(d), 10(a) and 10(c) of the National Labor Relations Act ("NLRA"), 29 U.S.C.

§§ 158(a)(1), 158(a)(3), 158(a)(5), 158(d), 160(a) and 160(c), are pertinent to this case.

Section 8(a) of the Act provides as follows:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; [or]
>
> . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the Act provides, in relevant part:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Sections 10(a) and (c) of the Act provide, in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.

. . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

STATEMENT OF THE CASE

1. This case presents the recurring question of whether the National Labor Relations Board can impose the terms of a predecessor's collective bargaining agreement upon a subsequent employer as a remedy for an unfair labor practice. The Ninth Circuit held that because New Breed bargained in bad faith and discriminatorily refused to hire its predecessor's employees, it forfeited its right to establish initial terms and conditions of employment and was required, as a remedy, to implement the

terms and conditions of its predecessor's (and *competitor's*) collective bargaining agreement. The Ninth Circuit's decision cannot be reconciled with settled NLRA principles (including the provisions of § 8(d) of the Act) or this Court's explicit holdings. In *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 102 (1970), the Court held that "while the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." The Ninth Circuit's decision also conflicts with *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), in which the Court held that, despite unlawfully refusing to bargain and committing additional unfair labor practices, a subsequent employer was not bound by its predecessor's collective bargaining agreement but, instead, had the right to establish its initial terms and conditions of employment.

While the First, Eighth and a divided *en banc* Seventh Circuit have adopted similar positions, the Ninth Circuit's holding conflicts with decisions of the Second, Third, Fourth and District of Columbia Circuits. The question presented raises issues of national importance going to the heart of the Board's authority to remedy unfair labor practices and the NLRA's policy of empowering the Board to supervise procedural aspects of union-employer relations, but not impose the substantive terms of parties' bargains.

2. For many years, private employers chosen through competitive bidding have operated the United States Army's container freight station and vehicle processing facility in Compton, California. From April 1,

1991 to March 31, 1994, the private employer operating the Compton facility was Maersk Pacific Limited ("Maersk"). In early 1994, the Government solicited competitive bids for the April 1, 1994 to March 31, 1996 management contract (App. 46). Maersk, New Breed and other companies submitted bids; the Government eventually awarded the management contract to New Breed (App. 46, 48).

In the short time between the award of the contract (March 8) and the beginning of work (April 1), New Breed assembled its work force. Following its usual practice (App. 70), New Breed solicited applicants through a blind advertisement placed in a local newspaper on March 23 and 24 (to which no Maersk employees responded), and conducted interviews with applicants at a local hotel from March 24 to 27. New Breed did not post a notice of the interviews in the Compton facility and did not tell Maersk employees that it was interviewing, but at some point allegedly told Maersk employees and union officials – representatives of the International Longshoremen's and Warehousemen's Union (the "Union") which represented Maersk employees at the Compton facility[1] – that it was planning to hire Maersk employees (App. 48-55). On March 29 and 30, 1994, New Breed called the successful applicants and offered them jobs on terms

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[1] Maersk was a member of the Pacific Maritime Association ("PMA") which had negotiated multi-employer collective bargaining agreements with local unions associated with the International Longshoremen's and Warehousemen's Union. The PMA/Longshoremen's contract covered 12 Maersk employees (App. 43).

substantially different from those under the Longshoremen's collective bargaining agreement with the PMA (App. 58-60).[2] On March 31, 1994, New Breed officially informed the Army officer in charge, Union officials, and Maersk employees that New Breed would not be hiring any Maersk employees to staff the Compton facility (App. 58-59).

3. On April 4, 1994, the Union filed the first of several charges with the National Labor Relations Board. The charges alleged that New Breed was a successor employer that had unlawfully failed to hire Maersk employees, unlawfully failed to bargain with the Union, and unlawfully established initial terms and conditions of employment without bargaining. The Board's Regional Director sought an interim injunction in the United States District Court for the Central District of California under section 10(j) of the Act, 29 U.S.C. § 160(j), to require New Breed to recognize and bargain with the Union, offer to hire Maersk employees into the positions they previously held, and implement the same terms and conditions of employment that Maersk had provided its employees through its PMA-negotiated collective bargaining agreement. On August 22, 1994, the district court issued the requested injunction (App. 132-36).

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[2] The differences included a relaxation of work rules and job classifications, reduction of base pay from $22.68 to $21.00 hourly without daily overtime, reductions in vacation and sick leave, and elimination of pension coverage (App. 60).

New Breed appealed. On January 6, 1995, the Ninth Circuit held that the district court had not abused its discretion in entering the interim injunction, but found that the district court erred as to its scope. The court of appeals required New Breed to recognize and bargain with the Union and offer to hire Maersk employees into the positions that they had held with Maersk, if available, but held that the district court erred "in requiring New Breed to restore the former wages and conditions of employment at the Compton site. Requiring New Breed to set initial wages at the union rate is not necessary to 'protect the integrity of the collective bargaining process [or] to preserve the Board's remedial power.' " (App. 129-31) (citations omitted).

In September 1994, following the district court's entry of the interim injunction, a Board administrative law judge ("ALJ") held a hearing on the merits of the unfair labor practice charges (App. 36-101). On February 14, 1995, the ALJ issued his decision, concluding on disputed facts that New Breed had violated § 8(a)(3) of the Act by failing to hire the Maersk employees because of anti-union animus. Purporting to rely on the Board's 1974 decision in *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), *enforced without opinion sub nom. NLRB* v. *Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975), the ALJ also decided that New Breed had violated § 8(a)(5) of the Act (App. 86-87). The ALJ presumed that New Breed would have hired a majority of Maersk's employees had it not engaged in § 8(a)(3) violations (a conclusion that is not disputed in this petition), and held that New Breed was required to bargain with the Union, was not free to establish its own

initial terms and conditions of employment and was bound to its competitor's labor agreement:

> In such a situation, it is obvious from the onset that the union will represent a majority of the successor's employees and the bargaining obligation therefore attaches immediately, before employees have been hired. In such a situation the employer is not free to set initial terms and conditions of employment without bargaining with the labor organization or organizations that represent the employees. *In such a situation, the terms of employment maintained by the predecessor must be carried forward unless and until bargaining has occurred.*
>
> * * *
>
> I shall order Respondent . . . to rescind the unilateral changes, including all initial terms and conditions of employment different from those in place under Maersk's agreement with the unions. . . .

(App. 86-87, 90) (emphasis added). The ALJ found that New Breed was required to "carry forward" the PMA/Longshoremen's contract despite his additional finding that New Breed did not violate the Act by refusing to join the PMA (App. 64-65, 90). On June 30, 1995, the Board summarily affirmed the ALJ's decision and remedy (App. 28-36).

4. On cross-petitions for review and enforcement, the Ninth Circuit enforced the Board's order. The panel unanimously upheld the Board's determination that New Breed had committed unfair labor practices. The panel disagreed, however, on whether it could impose the

terms of the PMA/Maersk collective bargaining agreement upon New Breed. In resolving that issue, the majority relied upon the Seventh Circuit's 6-5 *en banc* decision in *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992), reasoning that:

> "Where all or substantially all of the predecessor's employees would have been retained but for the successor's unlawful discrimination, the successor loses the right to set initial terms and conditions of employment and violates the Act if it unilaterally alters the predecessor's terms without first consulting the union. In such cases, the Board may impose a status quo ante remedy to restore the situation to what it would have been absent the successor's unfair labor practice."
>
> * * *
>
> A successor employer who unlawfully refuses to hire Union employees cannot later avoid the terms of its predecessor's collective bargaining agreement by merely asserting that had it in fact engaged in collective bargaining, it would have not agreed to the terms that bound the predecessor employer.

(App. 17) (quoting *U.S. Marine*, 944 F.2d at 1320). The majority therefore concluded that it was appropriate to impose upon New Breed the terms and conditions of its competitor's (Maersk's) collective bargaining agreement, both as the basis for computing back pay for Maersk employees whom New Breed unlawfully failed to hire and as the basis for New Breed employment during the pendency of prospective bargaining (App. 18).

Judge O'Scannlain dissented, relying on *Burns*, the dissent in *U.S. Marine*[3] and contrary precedents from the Second, Fourth and District of Columbia Circuits (App. 19-27). The dissent believed that imposition of Maersk's terms of employment upon New Breed was punitive and therefore beyond the scope of the NLRA (App. 22). Under *Burns*, "requiring a successor to accept its predecessor's agreement goes beyond remediation, because the successor's only obligation is to bargain with the predecessor's employees." (App. 23). The majority's resolution constituted an impermissible "forfeiture of a successor's privilege to set the initial terms and conditions of employment [that] is contrary to such policies as freedom of contract and the need to resuscitate ailing business." (App. 26) (citing *U.S. Marine*, 944 F.2d at 1331 (Easterbrook, J., concurring in part and dissenting in part)). Finally, Judge O'Scannlain found that the presence of New Breed's § 8(a)(3) violations was irrelevant to New Breed's bargaining obligation:

> Here, the remedy for discriminating against the eleven Maersk employees would be an order to hire them. It goes beyond remediation to impose the prior contract because New Breed would have had the right to set its own terms and conditions had it hired those employees initially. Because New Breed violated its obligation as a successor to bargain, the proper remedy is a

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[3] U.S. Marine involved the sale of an ongoing business. In contrast, both *Burns* and this case involve one company outbidding a competitor for a service contract.

> bargaining order, not reinstatement of the contract that existed under Maersk.

(App. 26-27).

REASONS FOR GRANTING THE WRIT

The question presented in this petition goes to the heart of the Board's authority under the NLRA to remedy unfair labor practices. Sections 8(a)(3) and (5) of the Act, respectively, proscribe anti-union discrimination and refusals to bargain; Sections 10(a) and (c) empower the Board to "prevent" unfair labor practices and award back pay. See *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 185, 188-89 (1973) (orders requiring reinstatement and back pay are aimed at "restoring the economic status quo that would have obtained but for the company's wrongful [acts]," unless, as in "[*NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972)] . . . an important labor policy oppose[s] saddling the successor employer with the obligations of the collective-bargaining agreement"); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (Board has broad authority in "devising remedies to effectuate the policies of the Act," so long as the remedy is not punitive). Section 8(d) of the Act, on the other hand, establishes the countervailing policy that the obligation to bargain collectively "does not require either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

When presented with closely analogous facts in *Burns*, including a "successor"/competitor that committed independent unfair labor practices (under § 8(a)(2) in

conjunction with its refusal to bargain), this Court reversed a Board determination that Burns was "bound to [its predecessor's] contract as if it were a signatory thereto." *Burns*, 406 U.S. at 276 n. 2, 294-95. As the *Burns* Court explained, its holding flowed from its earlier decision in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), where the Court, construing § 8(d) of the Act, held that "while the Board does have the power to require employers and unions to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining appeal." *Id.* at 283 (quoting *H.K. Porter*, 397 U.S. at 102).

The Ninth Circuit's approval of a Board remedy imposing a punitive forfeiture of the employer's right (recognized in *Burns*) to establish the initial terms of employment also conflicts with decisions of other courts of appeals that hold that the Board is without such authority. These courts recognize that the Act's twin purposes of preserving industrial peace and freedom of contract are balanced by governmental supervision of the collective bargaining process, without official compulsion of actual terms of an agreement. Now several circuits have joined the Ninth Circuit in impermissibly tipping the scales strongly in favor of preserving existing labor agreements, at the expense of competitive efforts to revive foundering industries on initial terms which *Burns* says successors have every right to impose. The Court should grant review to resolve the division in the courts of appeals over the Board's authority to impose punitive remedies and to reaffirm that the principles of *Burns* and *H.K. Porter* foreclose any remedy (as here) that purports

to require a successor employer to forfeit its right to set initial terms of employment.

I. The Ninth Circuit's Decision Is Irreconcilable With This Court's Decisions In *Burns* And *H.K. Porter.*

In *Burns*, this Court established the fundamental rule that a subsequent employer, even if it has a duty to bargain with the representative of its employees, cannot be forced to accept any of the substantive terms that its predecessor had negotiated with that representative.[4] The respondent in *Burns*, a security service, successfully outbid Wackenhut Corp., its newly-unionized predecessor, for a plant protection service contract. Burns hired 27 of Wackenhut's employees to fill its 42-employee work force, but refused to bargain with their union, the United Plant Guard Workers ("UPG"), and instead required all of the employees to join a rival union. The Board found that Burns committed unfair labor practices by assisting a rival union and refusing to bargain in violation of §§ 8(a)(2) and (5) of the Act, and ordered Burns to bargain with the UPG and observe the terms of the Wackenhut/UPG collective bargaining agreement. 406 U.S. at 276-77.

This Court, however, held that the Board could not remedy Burns' unfair labor practices by imposing its predecessor/competitor's terms of employment. Instead,

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[4] In *Burns*, then-Justice Rehnquist (joined by three other justices) disputed whether Burns was a successor and had any statutory obligation even to bargain. 406 U.S. at 296 (Rehnquist, J., dissenting in part). Thus, none of the justices in *Burns* found that Burns was bound by the terms of its predecessor's labor agreement.

the Board could only order Burns to bargain in good faith with the UPG. In reaching that conclusion, this Court found that binding a subsequent employer to the terms of a predecessor's collective bargaining agreement would unduly "subordinate" the bargaining freedom of employers and unions to the NLRA's conflicting goal of "[p]reventing industrial strife." *Burns*, 406 U.S. at 287.

The Court found that its conclusions were required not only by § 8(d), but also by its decision two years earlier in *H.K. Porter*. In that case, the Court held that § 8(d) barred the Board from imposing substantive contract terms on an employer who violated § 8(a)(5) by bargaining in bad faith "solely to frustrate the making of any collective bargaining agreement." 387 U.S. at 101. Nevertheless, the Court in *H.K. Porter* found that a Board remedy imposing substantive contract terms (a dues checkoff clause) was prohibited by § 8(d) and beyond the remedial scope of § 10. *Id.* at 107-08. As the Court explained in *Burns*, "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." 406 U.S. at 287 (quoting *H.K. Porter*, 397 U.S. at 108).[5]

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[5] See also *NLRB* v. *Insurance Agents' Int'l. Union*, 361 U.S. 477, 487 (1960) ("It remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of terms of collective bargaining agreements."); *NLRB* v. *American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952) (it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements").

Accordingly, because a subsequent employer cannot be bound by a predecessor's collective bargaining agreement, Burns could not be said (logically or legally) to have "changed" unilaterally any pre-existing terms when it set the initial terms and conditions of employment – it had "no previous relationship whatsoever to the bargaining unit." 406 U.S. at 294. In *dictum*, the Court stated that there might be an exception to this rule where "it is perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit and in which it will be appropriate to have him initially *consult* with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-95 (emphasis added). Whether the general rule or "perfectly clear" *dictum* applied, however, this Court found that the Board could not impose Wackenhut's collective bargaining agreement on Burns. See also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 40 (1987) (reaffirming *Burns*).

In this case, the Ninth Circuit acknowledged the *Burns* rule that "a successor employer is not bound by the predecessor's collective bargaining agreement." (App. 12). However, because New Breed had not only refused to bargain, but also violated § 8(a)(3) by discriminatorily refusing to hire its competitor's (Maersk's) employees, the Court found that the Board was justified in imposing the PMA/Longshoremen's collective bargaining agreement upon New Breed (App. 17-18).[6]

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[6] To avoid this remedy, the employer would have to prove not the terms it would seek or adopt after bargaining to an impasse, but instead shoulder the speculative "burden of proving what favorable results good faith collective bargaining would have produced." (App. 17).

The Ninth Circuit's reasoning is impossible to reconcile with *Burns* and *H.K. Porter*. Had New Breed not committed unfair labor practices and hired its competitor's workforce, it could have set initial terms of employment unilaterally. *Burns*, 406 U.S. at 291. In other words, New Breed "would have been free to use its own terms even if it had shouted from the rooftops that it planned to hire every [Maersk] employee who applied." *U.S. Marine Corp.* v. *NLRB*, 944 F.2d at 1305, 1329 (7th Cir. 1991) (Easterbrook, J., concurring in part and dissenting in part), *cert. denied*, 503 U.S. 936 (1992). Moreover, the Ninth Circuit's reliance on New Breed's § 8(a)(3) violations as a basis for imposing punitive relief in the form of the PMA/Longshoremen's labor agreement cannot be reconciled with the facts of *Burns* itself: there, too, the employer had engaged in serious independent unfair labor practices (unlawfully assisting a rival union to completely displace the UPG in violation of § 8(a)(2)), but the Court nevertheless refused to uphold the Board's order imposing Wackenhut's UPG contract on Burns. This is because, under "*Burns*, . . . an important labor policy [freedom to establish initial terms of employment] oppose[s] saddling the successor employer with the obligations of the [predecessor's] collective-bargaining agreement" despite the general authority ascribed to the Board in § 10(c) of the Act to remedy unfair labor practices. *Golden State Bottling*, 414 U.S. at 185.[7]

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[7] For similar reasons, whatever the *Burns* "perfectly clear" *dictum* and its concomitant duty to "consult" with the predecessor's union means, the holding and facts of *Burns* make clear that remedies for breaches of such duties do not include imposition of the competitor's/predecessor's labor agreement. 406 U.S. at 292-95.

In sum, the fact that two or more unfair labor practices have been committed does not authorize the Board to augment its § 10(c) make-whole authority with the power to impose punitive relief by requiring the employer to forfeit its right to establish initial terms of employment.[8]

II. The Decisions Of The Courts Of Appeals Reflect Widespread Disagreement As To The Board's Power To Impose Predecessors' Agreements On Successors.

The divided Ninth Circuit in this case, a divided *en banc* Seventh Circuit and the First and Eighth Circuits have each held, disregarding the facts of *Burns* and principles of *H.K. Porter*, that a subsequent employer who commits unfair labor practices forfeits its right to set initial terms of employment and empowers the Board to

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[8] As dissenting Judge Easterbrook pointed out in *U.S. Marine*, the Board's effort to punish under the guise of remedy is a result of its desire to enforce the Act regardless of the violence it does to the policies underlying the Act:

> [The Board's l]ack of authority to penalize, and thus to deter, means that there will be too many violations. Agencies, sensing the need to pack a wallop, strain against the limits of their powers and create *de facto* penalties. Needing to make a penalty look like a remedy, the Board prescribes back pay and restoration of terms – in other circumstances remedial, but here exceeding the sanction that would be appropriate if the Board had the power to impose explicit fines.

U.S. Marine, 944 F.2d at 1331 (Easterbrook, J., concurring in part and dissenting in part).

impose its predecessor's contract. See *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460 (9th Cir. 1997) (App. 1-27) (successor/competitive bid winner); *Pace Indus., Inc.* v. *NLRB*, Nos. 96-1643 & 96-1943 ___ F.3d ___, 1997 U.S. App. LEXIS 16062, at *26 (8th Cir. July 1, 1997) (successor/asset purchaser violates §§ 8(a)(3) and 8(a)(5) through discriminatory hiring; predecessor's contract imposed without consideration of *Burns* or *H.K. Porter*); *NLRB* v. *Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995) (successor/asset purchaser violates §§ 8(a)(3) and 8(a)(5) through discriminatory hiring; predecessor's contract imposed without consideration of *Burns* or *H.K. Porter*); *U.S. Marine*, 944 F.2d at 1319-23 (successor/asset purchaser "may not be permitted to benefit from its discriminatory activities"; predecessor's contract imposed). As a result, the holdings trump both the *Burns* rule that a successor has the right to establish initial terms of employment and *H.K. Porter*'s admonition that the Board is "without power" to compel a company to agree to a substantive contractual provision.

As dissenting Judge O'Scannlain recognized, the Ninth Circuit's forfeiture rationale conflicts with that of the Second, Fourth and District of Columbia Circuits. (App. 24-25); see also *U.S. Marine*, 944 F.2d at 1328-29 (Easterbrook, J., concurring in part and dissenting in part). As those courts have recognized, successors may set their own terms and conditions of employment whether or not they expect the predecessor's employees to obtain positions. See *NLRB* v. *Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975), *aff'ing without opinion Spruce Up Corp.*,

209 N.L.R.B. 194, 195 (1974) (construing *Burns*);[9] *Nazareth Regional High Sch.* v. *NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977) ("A successor-employer's right to set initial terms of employment may not be rendered nugatory solely on the basis of an expression of intention to rehire its predecessor's employees particularly when the successor's other actions are completely inconsistent with such a statement"); *International Ass'n of Machinists & Aerospace Workers, AFL-CIO* v. *NLRB*, 595 F.2d 664, 676 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979) (successor employer did not violate § 8(a)(5) when it refused to adopt its predecessor's collective bargaining agreement after winning a contract in competitive bidding despite clear indication of a desire to retain most of the work force).

At least two circuits, moreover, have refused to impute the terms of the predecessor's contract and have followed the *Burns* holding, irrespective of the presence of other unfair labor practices. See *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-08 (3d Cir. 1990) (finding § 8(a)(2) unlawful assistance, § 8(a)(3) discriminatory

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[9] Although the ALJ and Board in this case purported to rely on *Spruce Up* (App. 87), the Board has since divided sharply over whether *Spruce Up* is an accurate and appropriate interpretation of *Burns*. See *Canteen Corp.* v. *NLRB*, 103 F.3d 1355, 1359-60, 1362 (7th Cir. 1997) (Board's decision below "plac[es] a significant and perhaps fatal cloud over the continued viability of the specific *Spruce Up* criterion"); *Advanced Stretchforming Int'l, Inc.*, 323 N.L.R.B. No. 84, 1997 NLRB LEXIS 310 (1997) (finding § 8(a)(5) violation and imposing predecessor's contract based on rule that an employer who violates § 8(a)(1) or § 8(a)(3) "forfeit[s] its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union").

refusal to hire and § 8(a)(5) refusal to bargain violations; ordering back pay at predecessor's contract rates to discriminatees but refusing to enforce Board order imposing predecessor/competitor's contract on successor because "there was no 'situation' . . . to which the [new hires] could be restored" and Board order "must be considered a punitive measure, and hence not enforceable"); *Nazareth Regional High Sch.*, 549 F.2d at 881-82, 883-84 (under *Burns*, successor/competitor was free to establish initial employment terms despite unlawful refusal to bargain and presence of independent "inherently coercive" anti-union activities in violation of § 8(a)(1)); *U.S. Marine*, 944 F.2d at 1330 (Easterbrook, J., concurring in part and dissenting in part) (Board contention that presence of § 8(a)(3) violations means employer "forfeited" right to set initial terms "is the language of penalty; its order is the fact of penalty"). Cf. *Kessel Food Markets, Inc.* v. *NLRB*, 868 F.2d 881, 889 (6th Cir.), *cert. denied*, 493 U.S. 820 (1989) (finding § 8(a)(1) anti-union activity and § 8(a)(3) discriminatory refusal to hire violations but refusing, based on an alleged "discriminatory scheme" to infer § 8(a)(5) refusal to bargain violation); *Spruce Up*, 209 N.L.R.B. at 195-98 (although employer lawfully set initial terms, continuing refusal to bargain or reinstate employees violates §§ 8(a)(1) & (5)).

Finally, other circuits have staked out a middle ground – one that conflicts with the Ninth Circuit's approach but still fails to pay due respect to *Burns* and *H.K. Porter*. E.g. *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996) (enforcing Board order imposing predecessor's wage rates on asset purchaser successor on basis it "was plainly intended to be

remedial, [not punitive,] for it is temporally limited"); *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (6th Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) (remanding case to Board to determine length of "time which would have been required for bargaining" to which back pay at predecessor's wage rates would be limited for asset purchaser successor). In all events, it is clear that the Board's position is incompatible with *Burns* and *H.K. Porter*, that the courts of appeals are not consistently applying *Burns*, and that the extent to which the goals of national labor policy are realized depends in large measure on which court of appeals resolve a given dispute.

III. Prompt Resolution Of The Issue Presented Is A Matter Of Great National Importance.

In addition to the violence it works on the purposes and policies of the NLRA, the Ninth Circuit's approach to remedies raises enormous practical obstacles for employers attempting to revitalize failing businesses or compete with uncompetitive ones. In recent years, the American economy (unlike many in Europe and elsewhere) has allowed both new entrepreneurs and mature, knowledgeable managements to step in and either enter competitive bids for work previously monopolized by inefficient producers or to purchase moribund facilities and provide new growth opportunities which benefit employees individually and the economy as a whole. As *Burns* makes plain, the NLRA (though enacted many years ago) strikes a balance between the rights of workers and those of employers and recognizes that a new bidder or purchaser must be accorded freedom to make necessary changes:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

406 U.S. at 287-88.

Under the Ninth Circuit's approach, a predecessor/competitor and its employees will be able to determine *ad hoc* the successor's terms of employment whenever the Board determines on controverted facts that § 8(a)(3) violations or other unfair labor practices have occurred. Not only does the approach depart from the NLRA's purposes and policies, it is particularly ill-advised in this era of corporate consolidations, restructuring and revitalization. Employees have a right to effective remedies against their employer's discriminatory acts. Reinstatement and back pay, as §§ 10(a) and (c) provide, are such effective remedies. But those remedies should not be expanded to include punitive forfeiture requirements which handicap new employers. New purchasers and bidders must be able to start afresh, as this Court recognized in its holdings in *Burns* and *H.K. Porter*. This court should grant review to reaffirm and clarify those

decisions so that necessary corporate restructuring can continue with due regard to NLRA-protected rights.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and give the case plenary consideration.

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NEW BREED LEASING CORPORATION,
Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Cross-Petitioner.

Nos. 95-70607, 95-70696.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 11, 1996.

Decided April 30, 1997.

On Cross Petitions for Review and Enforcement of an Order by the National Labor Relations Board, Members Browning, Cohen, and Truesdale Presiding. N.L.R.B. Nos. 21-CA-29995, 21-CA-30003.

Before PREGERSON, D.W. NELSON, and O'SCANNLAIN, Circuit Judges.

PREGERSON, Circuit Judge:

New Breed Leasing Corporation ("New Breed") petitions for review of a National Labor Relations Board ("Board") decision that New Breed engaged in unfair labor practices in violation of sections 8(a)(1), 8(a)(3), and (8)(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1), (3), (5), by refusing to hire its predecessor's employees because of their union affiliation and by refusing to recognize and bargain with the unions representing the employees. The Board's General Counsel cross-petitions for enforcement of the Board's order

which requires New Breed to reinstate its predecessor's employees with back pay, restore original working conditions, and bargain with the unions. We deny the petition for review and enforce the Board's order.

FACTS AND PROCEDURAL HISTORY

I. The Compton Army Terminal

The United States Army operates a container freight station and vehicle processing facility ("army terminal") in Compton, California. The operation of the terminal is handled by private employers under contract with the Army. These employers have recognized the International Longshoremen's and Warehousemen's Union, Local 13; International Longshoremen's and Warehousemen's Union, Local 63; and the International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit (collectively, the "Unions"), as the collective-bargaining representatives of the terminal's employees.

From 1991 to 1994, Maersk Pacific Limited ("Maersk") operated the army terminal. Maersk was a member of the Pacific Maritime Association ("PMA"), a multi-employer organization that represented its members in negotiating and administering collective bargaining agreements. Maersk was bound to Union contracts through its membership in the PMA, and employed twelve employees represented by the Unions.

II. New Breed's Bid and Hiring Practices

A new contract to operate the army terminal was scheduled to take effect on April 1, 1994. Among the

bidders for this contract were Maersk, the then-current operator, and New Breed, a North Carolina company. New Breed was awarded the contract in March 1994.

In its bid, New Breed stated that it had met with the PMA regarding working with that organization to obtain long-term and occasional employees. The bid also suggested that notice of job opportunities could be posted and selection of employees conducted under the auspices of the PMA. In its bid, New Breed explained that "if existing employees are retained . . . any added training will take place as soon as possible."

In February 1994, before the contract was awarded, New Breed submitted a membership application and $1,000 fee to the PMA. On March 9, the PMA sent a letter to New Breed informing it that its membership application had been accepted, and that an officer of New Breed would need to sign the PMA bylaws. New Breed failed to cause a company officer to sign these bylaws. On March 11, the PMA sent a letter agreement to New Breed that explained financial and payroll details. New Breed failed to sign and return that letter. Because New Breed did not complete the application process, it never became a PMA member.

After being awarded the army terminal contracts, New Breed began recruiting employees for the army terminal in mid-March. New Breed and the Board dispute how New Breed approached Maersk's employees. Union agents testified that James Moynihan and William Lee – respectively, New Breed's operation manager and consultant – expressly indicated that Maersk's employees would be retained. One Maersk employee, Bernis Gald, testified

that Moynihan and Lee told her that she would be needed during the transition period when New Breed assumed operations. Another Maersk employee, Eric Gonzales, testified that Moynihan informed him that New Breed would "go with the Local 13 work force," and that Moynihan said, "I don't see any problem with the present work force there . . . it is going to stay status quo." New Breed contests the truth of the testimony of each of these witnesses.

It is uncontested that New Breed recruited new employees by placing anonymous advertisements in local newspapers. Responses were then screened, and promising applicants were interviewed at a local hotel. New Breed did not post notices of job openings at the army terminal; did not tell Maersk employees of the interview process; and did not inform the Unions of the hiring process. As a result, no Maersk employees filed employment applications with New Breed, or requested interviews.

After briefs were submitted in this case, but before oral argument, the Army informed New Breed that its contract would not be extended. New Breed's contract expires on March 31, 1997.

III. New Breed and the NLRB

In April 1994, the Unions filed unfair labor practice charges against New Breed with the Board. In May, the NLRB Regional Director for Region 21 ("Regional Director") issued unfair labor practice complaints, alleging that New Breed was a successor employer with respect to the former Maersk employees represented by the Unions.

The complaints further alleged that New Breed violated sections 8(a)(3) and (1) of the Act by refusing to hire these employees. Finally, the complaints alleged that New Breed violated sections 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Unions as representatives of New Breed's unit employees, in establishing its employees' terms and conditions of employment without bargaining with the Unions, and by failing to bargain with the Unions regarding changes made to terms and conditions of employment that existed with regard to Maersk's former employees.

A. The 10(j) Proceeding

In August 1994 the Regional Director petitioned the federal district court for a preliminary injunction pursuant to section 10(j) of the Act, 29 U.S.C. § 160(j), pending the resolution of the unfair labor practice complaints against New Breed filed by General Counsel with the NLRB.

The district court granted a temporary injunction and ordered New Breed to reinstate Maersk employees, reinstate prior working conditions, and bargain with the Unions. *Aguayo v. New Breed Leasing Corp.*, No. 94-5196 AWT (CTx) (C.D. Cal. Aug. 22, 1994). New Breed appealed. This court affirmed the grant of the temporary injunction. *Aguayo v. New Breed Leasing Corp.*, 46 F.3d 1138, 1138 (9th Cir. 1995) (mem.) We found, however, that the district court had erred in ordering New Breed to restore former wages and conditions of employment for the Maersk employees, because at the injunctive phase of

the proceedings this remedy was not necessary to "protect the integrity of the collective bargaining process [or] to preserve the Board's remedial power." *Id.* (citing *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc)). Accordingly, we remanded to the district court to "reconsider the appropriate scope of that injunction." *New Breed Leasing Corp.*, 46 F.3d at 1138.

We explained, however, that "in the event the Board finds that New Breed committed an unfair labor practice by setting initial wages below the union rate, [the Board could] fashion a back pay award to remedy that harm." *Id.*

B. Prosecution of the Unfair Labor Practice Charges Before the Administrative Law Judge and the NLRB

The Board's General Counsel brought the unfair labor practice complaints against New Breed before an administrative law judge ("ALJ"). In an order dated February 14, 1995, the ALJ found that New Breed had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act by failing to hire Maersk employees in order to avoid becoming a "successor employer," and by refusing to recognize and bargain with the Unions. The ALJ recommended that the NLRB order New Breed to reinstate the Maersk employees to their former positions, recognize and bargain with the Unions, and restore the status quo ante with respect to wages and terms and conditions of employment. In addition, the ALJ recommended that New Breed be required to make the employees whole by providing back pay with interest.

In an order issued on June 30, 1995, the Board affirmed the ALJ's rulings, findings, and conclusions, and adopted the ALJ's recommended orders. *New Breed Leasing Corp.*, 317 N.L.R.B. 1011, 1995 WL 407188 (1995). The NLRB left the determination of the number of Maersk employees entitled to reinstatement and back pay to the compliance stage of its proceedings. *Id.* at n. 4.

New Breed now petitions for review of the Board's June 30 order. The Board cross-petitions for enforcement of its order.

JURISDICTION

We have jurisdiction over the NLRB's decision and order under sections 10(e) and (f) of the Act, 29 U.S.C. § 160(e), (f).

STANDARD OF REVIEW

We will enforce a decision of the NLRB if "its findings of fact are supported by substantial evidence and if the Board correctly applied the law. . . . " *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (citation and internal quotations omitted). While reviewing a NLRB decision we are mindful that " 'the Board is to be accorded special deference in drawing derivative inferences from the evidence.' " *Kallmann v. NLRB*, 640 F.2d 1094, 1098 (9th Cir. 1981) (quoting *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980)).

We defer to the Board's interpretation of the Act if it is "reasonably defensible." *NLRB v. General Truck Drivers Local 315*, 20 F.3d 1017, 1021 (9th Cir.), *cert. denied*, 513

U.S. 946, 115 S. Ct. 355, 130 L. Ed. 2d 310 (1994) (citation and internal quotations omitted).

We may overturn the Board's remedial order only for a " 'clear abuse of discretion.' " *California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (quoting *NLRB v. C.E. Wylie Constr. Co.*, 934 F.2d 234, 236 (9th Cir. 1991)). "When the Board . . . makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47, 73 S. Ct. 287, 289, 97 L. Ed. 377 (1953) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S. Ct. 1214, 1218, 87 L. Ed. 1568 (1943)). Courts of appeal should not substitute their judgment for that of the Board when deciding how best to remedy the effects of unfair labor practices. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 899, 104 S. Ct. 2803, 2812-13, 81 L. Ed. 2d 732 (1984).

DISCUSSION

New Breed challenges both the Board's findings and its remedy.

I. Credibility Findings

Credibility findings by an ALJ are upheld unless they are "inherently incredible or patently unreasonable." *Retlaw Broad.*, 53 F.3d at 1006 (citations and internal quotations omitted).

New Breed challenges the ALJ's finding that the testimony of New Breed's operations manager Moynihan

should not be credited. This challenge lacks merit. The ALJ's finding that Moynihan lacks credibility is neither inherently incredible nor patently unreasonable, and the record as a whole substantially supports the ALJ's credibility determinations. The ALJ provided substantial bases for each credibility determination, including determinations regarding Moynihan's demeanor, the coherence of his testimony, and corroboration of his testimony by other witnesses.

Nevertheless, New Breed argues that because the ALJ credited parts of Moynihan's testimony in a separate proceeding involving employee terminations – not at issue here – all of Moynihan's testimony in this case should be credited. Yet New Breed cites no authority to support its argument that it is "incredible and unreasonable to discredit the testimony of Moynihan" in one case while crediting his testimony in another case. Contrary to New Breed's position, we find that the ALJ could reasonably find some parts of Moynihan's testimony believable and other parts unbelievable. In the separate proceedings concerning employee terminations, the ALJ specifically noted a change in Moynihan's demeanor and a new coherence in his story.

II. Finding of Anti-Union Animus

New Breed also challenges the Board's finding of anti-union animus. This court has recognized that the Board is "particularly capable of drawing inferences from the facts of a labor dispute." *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977). The Board may

base its inferences on either circumstantial or direct evidence. *Folkins v. NLRB*, 500 F.2d 52, 53 (9th Cir. 1974) (per curiam).

The record supports the Board's determination that New Breed's hiring practices were motivated by anti-union animus. New Breed's failure to join the PMA after stating in its bid that it was considering membership, its clandestine hiring practices, and its unfulfilled promises to retain the Maersk employees support the Board's finding that New Breed's failure to hire Maersk employees was motivated by anti-union animus.

We are not persuaded by New Breed's reliance on *Industrial Catering Co.*, 224 N.L.R.B. 972, 1976 WL 7109 (1976). In *Industrial Catering*, the Board held that an employer did not violate the Act by filling vacancies according to its standard procedures where: (1) the new employer did not have a contractual relationship with the previous employer, (2) the "employing industry" had changed, and the new employer's methods of operation differed from those of the previous employer, (3) there was a complete break in operations between the time when the previous employer terminated its operations and when the new employer took over, (4) the collective bargaining agreement with the previous employer had expired, and (5) none of the predecessor's employees were employed by the new employer. *Id.* at 984.

Moreover, unlike the employer in *Industrial Catering*, New Breed is engaged in exactly the same methods of operation as Maersk, assumed operations immediately following Maersk's termination, and sought to avoid a valid, existing collective bargaining agreement. New

Breed's actions are therefore distinguishable from those of the employer in *Industrial Catering*. Thus, *Industrial Catering* does not preclude the Board's finding of anti-union animus in the circumstances of this case.

III. Adequacy of Maersk Employees and Their Failure to Apply for Positions

In addition to finding anti-union animus, the ALJ found that New Breed failed to prove that it had a legitimate reason for failing to hire any Maersk employees. The Board upheld the findings, which New Breed challenges. We decline the invitation to upset these findings.

New Breed argues that it would have declined to hire Maersk employees, regardless of their union affiliation, because Maersk employees were deficient and no Maersk employee applied for a position. *See Airport Parking Management v. NLRB*, 720 F.2d 610, 613 (9th Cir. 1983) (holding that when a finding of impermissible motivation in hiring has been made, an employer may defend the hiring by showing that, even absent the illegal motivation, it would not have hired the predecessor's employees.) This defense lacks merit. New Breed's characterization of Maersk employees as "deficient" is belied by evidence that Moynihan, the company's operations manager, stated that he saw no problem with Maersk employees. Evidence that New Breed repeatedly assured Maersk employees of continued employment also undermines its current contention that it viewed Maersk employees as inadequate. Finally, New Breed's argument that Maersk employees failed to apply for positions is vitiated by the

fact that Maersk employees were never notified of New Breed's surreptitious recruitment plan.

The evidence supports the Board's finding that New Breed would have hired Maersk employees, if not for its anti-union animus.

IV. New Breed's Intent to Avoid Successorship

A new employer is deemed a successor employer if it (1) conducts essentially the same business as the former employer and (2) a majority of the new employer's work force consists of former employees or would have consisted of former employees absent a refusal to hire because of anti-union animus. *Kallmann*, 640 F.2d at 1100. An employer cannot avoid becoming a successor by unlawfully refusing to hire a predecessor's employees. *Id.* While a successor employer is not bound by the predecessor's collective bargaining agreement, *NLRB v. Burns Int'l Sec. Serv. Inc.*, 406 U.S. 272, 281-82, 92 S. Ct. 1571, 1579, 32 L. Ed. 2d 61 (1972), a successor employer must nonetheless recognize and bargain with the employees' bargaining representative, *Kallmann*, 640 F.2d at 1100.

New Breed concedes that it conducted essentially the same business as Maersk. New Breed disputes, however, that Maersk employees would have constituted a majority of its work force absent anti-union animus. New Breed argues that it was unaware of the repercussions of becoming a successor employer and therefore could not have been motivated by a desire to avoid successorship.

"Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also

self-serving." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Therefore, in the context of a discriminatory discharge, a trier of fact may infer motive from the "total circumstances proved." *Id.* In this case, New Breed promised Maersk employees that they would be retained, but then placed anonymous job advertisements in newspapers, thereby ensuring that no Maersk employee would apply for the positions. Moreover, New Breed's executives – who had considered joining the PMA and so advised the Army – decided not to join at the same time they decided not to hire Maersk employees. The evidence supports the Board's conclusion that New Breed's pattern of conduct evinces an intent to avoid bargaining with the Unions and the Board's finding that New Breed was a successor employer required to recognize and bargain with the Unions.

V. The Board's Remedy

A. Law of the Case

As a threshold matter, New Breed contends that the law of the case doctrine precludes our review of the Board's remedies. New Breed points out that when the matter was first before us on an appeal from the district court's grant of a temporary injunction, we left the determination of appropriate remedies to the Board "in the event the Board finds that New Breed committed an unfair labor practice." *Aguayo v. New Breed Leasing Corp.*, 46 F.3d 1138 (9th Cir. 1995) (mem.). " 'The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.' " *U.S. v. Cote*, 51 F.3d 178, 181 (9th

Cir. 1995) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993)).

The law of the case doctrine is inapplicable to the matter before us. In our previous appeal, we reviewed the district court's grant of a temporary injunction issued at the request of the Regional Director, to preserve the status quo. *Aguayo*, 46 F.3d at 1138. That appeal arose under section 10(j) of the Act, which provides: "The Board shall have power . . . to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order." 29 U.S.C. § 160(j) (emphasis added). In the section 10(j) action, the district court lacked jurisdiction to rule on the merits of the unfair labor practice charges, much less to determine appropriate final relief pending a hearing on the merits before the ALJ. In a section 10(j) proceeding, the district court must only determine whether a grant of temporary relief is "just and proper." *Miller*, 19 F.3d at 457. Accordingly, our decision in the section 10(j) appeal was limited to reviewing the district court's determination of appropriate temporary relief, and we deferred determination of the appropriate final remedy to the NLRB's usual adjudicatory procedures. *Aguayo*, 46 F.3d at 1138.

The Board has now determined what it regards as appropriate final remedies pursuant to section 10(c) of the Act, which provides that the Board shall "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). Our review of the

Board's section 10(c) determination of *final* remedies presents an entirely different legal question than that presented in our earlier review of the district court's section 10(j) grant of *temporary* relief.

Because we have not previously considered or decided the legal issues now before us, the law of the case doctrine is inapplicable to our review of the Board's final remedies. *Cote,* 51 F.3d at 181.

B. The Back Pay Remedy

The Board may impose remedial orders to restore the employment situation as nearly as possible to what it would have been absent unlawful discrimination. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 188, 61 S. Ct. 845, 849-50, 85 L. Ed. 1271 (1941). Reinstatement and back pay are appropriate when a successor refuses to hire its predecessor's employees because of anti-union animus. *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 177, 94 S. Ct. 414, 421, 38 L. Ed. 2d 388 (1973). The grant of back pay based on pay rates in the predecessor's collective bargaining agreement may be inappropriate, however, when the successor employer shows that it *lawfully* would not have agreed to the wage scale provided by the predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages. *Kallmann,* 640 F.2d at 1103; *NLRB v. Dent,* 534 F.2d 844, 847 (9th Cir. 1976).

The instant case presents a question of first impression: whether a successor employer who initially refuses to recognize and bargain with a union is required to pay back wages at union-scale rates when the successor

employer fails to present evidence that it lawfully would have reduced these rates. This question raises another. Who should bear the burden of proving what would have been the wages, terms and conditions of employment had good-faith collective bargaining between the successor employer and the union actually taken place: the employer who violated the Act, or the Board?

The Seventh Circuit has upheld the appropriateness of a status quo ante remedy when a successor employer failed to show that the conditions of employment would have changed had it initially bargained with the unions. *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1320 (7th Cir. 1991) (en banc), *cert. denied*, 503 U.S. 936, 112 S. Ct. 1474, 117 L. Ed. 2d 618 (1992). The court in *U.S. Marine Corp.* held:

> Where all or substantially all of the predecessor's employees would have been retained but for the successor's unlawful discrimination, the successor loses the right to set initial terms and conditions of employment and violates the Act if it unilaterally alters the predecessor's terms without first consulting the union. In such cases, the Board may impose a status quo ante remedy to restore the situation to what it would have been absent the successor's unfair labor practice.

944 F.2d at 1320.

The Seventh Circuit then concluded that " 'restoration of the status quo ante following an unfair labor practice is prima facie appropriate.' " *Id.* at 1323 (quoting *North Carolina Coastal Motor Lines Inc.*, 219 N.L.R.B. 1009, 1010 (1975), *enforced*, 542 F.2d 637 (4th Cir. 1976)). The

court found that any uncertainty should be resolved against the employer who discriminates. *Id.* at 1321.

The Seventh Circuit based its decision on the sound premise that a successor employer should not benefit from its wrongdoing. *Id.* This reasoning was recently echoed by the Second Circuit in *NLRB v. Staten Island Hotel,* 101 F.3d 858 (2d Cir. Dec. 3, 1996). The court in *Staten Island Hotel* explained:

> Because it was the Company's discriminatory acts that created the uncertainty as to what terms and conditions of employment would have been agreed, we conclude that it was within the discretion of the Board to place on the Company the burden of that uncertainty. The Board's decision to give the discrimination victims the benefit of the doubt is remedial rather than punitive.

Id. at 862.

We find the reasoning of the Seventh and Second Circuits persuasive. A successor employer who unlawfully refuses to hire Union employees cannot later avoid the terms of its predecessor's collective bargaining agreement by merely asserting that had it in fact engaged in collective bargaining, it would have not agreed to the terms that bound the predecessor employer. If a successor employer chooses to violate the Act, that employer must bear the burden of proving what favorable results good faith collective bargaining would have produced.

New Breed does not challenge the reinstatement of Maersk employees, but argues that under *Kallmann* this court should not award back pay at its predecessor's union-scale rates. New Breed misreads *Kallmann* insofar

as New Breed argues that *Kallmann* held that back pay at union-scale rates is never appropriate. Rather, in *Kallmann* we found that "the facts demonstrate that [the employer] would not have agreed to union demands to pay the higher rate." *Kallmann*, 640 F.2d at 1103. We further noted that the employer's refusal to pay the higher rate "would not be unlawful." *Id.*

Unlike the employer in *Kallmann*, New Breed has presented no evidence suggesting that, had it initially bargained in good faith with the Unions, the terms of employment would have differed from the union-negotiated conditions accepted by Maersk. The record is devoid of any evidence that the employees' wages would have changed had New Breed initially recognized and bargained with the Unions. When pressed in oral argument, New Breed's counsel was unable to refer the court to any evidence that bargaining between New Breed and the Unions would have resulted in different terms.

New Breed has failed to shoulder its evidentiary burden. We therefore conclude that the Board's grant of back pay based on the predecessor's Union pay scale restores as nearly as possible the employment situation that would have occurred absent New Breed's discrimination against the Union employees. Accordingly, we conclude that the Board's remedy is appropriate.

CONCLUSION

For the foregoing reasons we deny review and enforce the Board's order.

O'SCANNLAIN, Circuit Judge, concurring and dissenting in part:

I respectfully dissent from Part V of the court's opinion, which concludes that the law of the case doctrine is inapplicable to our review of the National Labor Relations Board's final remedies and requires New Breed Leasing Corporation to restore the status quo ante with respect to wages and terms and conditions of employment. I concur in the remainder of the opinion without reservation.

I

The majority concludes that the law of the case doctrine is inapplicable to our review of the National Labor Relations Board's ("NLRB" or "Board") final remedies, because "we have not previously considered or decided the legal issues now before us." *Supra*, at 1467. In *Aguayo v. New Breed Leasing Corp.*, 46 F.3d 1138, 1995 WL 7506, *1 (9th Cir. 1995) (unpublished disposition), which arises out of the same facts as the instant appeal, indeed it is an earlier stage in this very case, this court reviewed the district court's grant of an interim injunction in favor of the Regional Director of Region 21 of the NLRB, pursuant to 29 U.S.C. § 160(j). The district court's injunction required New Breed Leasing Corporation ("New Breed"), *inter alia*, (1) to recognize and bargain with the unions, (2) to hire all (eleven) of the Maersk employees, and (3) to restore the Maersk employees' initial wages and conditions of employment, pending resolution of the unfair labor practice charges subject to this appeal. This court upheld the injunction, but remanded to the district court

to "provide New Breed an opportunity to establish that fewer than eleven jobs would have been available for former Maersk employees regardless of New Breed's alleged unfair labor practice and *modify the injunction to permit New Breed to set initial wages and conditions of employment.*" *Aguayo,* 1995 WL 7506 at *1 (emphasis added). We held in no uncertain terms that the district court erred with respect to its status quo ante remedies:

> The district court did err, however, in requiring New Breed to restore the former wages and conditions of employment at the Compton site. Requiring New Breed to set initial wages at the union rate is not necessary to "protect the integrity of the collective bargaining process [or] to preserve the Board's remedial power."

Id. (internal citation omitted). I am at a loss to understand how the majority can so easily wipe the procedural slate clean and ignore this court's earlier holding on the same issue and facts.

The law of the case doctrine indeed precludes our review of the Board's remedies. *See, e.g., Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir.), *cert. denied*, 510 U.S. 815, 114 S. Ct. 64, 126 L. Ed. 2d 34 (1993) ("Undeniably, the decision of the circuit court in a prior appeal must be followed in all subsequent proceedings in the same case under the law of the case doctrine."); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989) ("Under the law of the case doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case."). The majority's decision on the Board's remedies simply does not square with this court's earlier disposition of the case.

II

Assuming arguendo that we are not precluded from reviewing the Board's remedies under the law of the case doctrine, the majority nonetheless errs in upholding the Board's status quo ante remedies. A successor employer violates section 8(a) of the National Labor Relations Act ("NLRA" or "Act") if it makes discriminatory hiring decisions and refuses to employ a predecessor's employees in order to avoid this obligation. 28 U.S.C. § 158(a). Substantial evidence supports the Board's conclusion that New Breed was (i) a successor employer who (ii) refused to hire its predecessor's employees because of their union affiliation and (iii) refused to recognize and bargain with the unions representing the employees. Because New Breed violated section 8(a)(3) and (1) of the Act, the Board may impose a *remedial* remedy to restore the situation to what it would have been absent the violation. The Board, however, may *not* impose a remedy that is punitive in nature. New Breed properly maintains that the Board's order requiring it to restore the wages, hours, and working conditions of the Maersk employees is punitive.

The Board's order reads, in relevant part:

> I shall order Respondent to offer the former Maersk unit employees in writing immediate, full, and unconditional employment in the unit positions they occupied when employed by Maersk, terminating unit employees not formerly employed by Maersk as necessary, if such positions no longer exist, they shall be offered substantially equivalent positions, without prejudice to their seniority and other rights and

> privileges they would have enjoyed if initially hired at the commencement of Respondents operations, and to make them whole for any loss of earnings and benefits. . . .
>
> I shall also order Respondent, on the Unions' request, to restore the status quo ante with respect to each unit, to rescind the unilateral changes, including all initial terms and conditions of employment different from those in place under Maersk's agreement with the Unions, in unit employees' wages, hours, and terms and conditions of employment implemented on and before April 1, 1994, and subsequently; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes in their wages, fringe benefits, and other terms and conditions of employment. . . .

The majority's decision is contrary to the weight of authority construing the Board's remedial power.

A

First, the majority's holding is not supported by the United States Supreme Court's decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972), where the Court first examined whether a successor employer is bound by its predecessor's collective bargaining agreement. The Supreme Court held that requiring a successor to accept its predecessor's agreement goes beyond remediation, because the successor's only obligation is to bargain with the predecessor's employees. The "parties need not make any concessions as a result of Government compulsion and

. . . they are free from having contract provisions imposed upon them against their will. . . . [H]olding . . . [the] employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities." *Burns*, 406 U.S. at 287, 92 S. Ct. at 1582. The Supreme Court carved out the "perfectly clear" exception to its rule when it is perfectly clear that all or substantially all of the predecessor's employees will be rehired. The exception only imposes a duty on the successor to "consult" with the union before it sets the initial terms and conditions of employment. The duty to consult however does not imply an obligation to accept the old terms of employment. *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-42, 107 S. Ct. 2225, 2232-35, 96 L. Ed. 2d 22 (1987) (discussing and reaffirming *Burns*).

B

Second, this court has consistently held that a successor employer is free to set the initial terms and conditions of employment. *New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1342 (9th Cir. 1990); *Sheet Metal Workers Int'l Ass'n Local No. 359 v. Arizona Mechanical & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988); *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981); *Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981); *NLRB v. Edjo, Inc.*, 631 F.2d 604, 606 (9th Cir. 1980); *NLRB v. Dent*, 534 F.2d 844, 847 (9th Cir. 1976). The majority seeks to avoid the application of these precedents by reframing the issue into an issue of first impression. However, its reasoning is not persuasive because our circuit has already determined that a successor employer has a duty to consult with the union

before unilaterally changing the terms of employment but has no obligation to accept its predecessor's labor agreement.

Under *Kallmann*, in particular, New Breed should not be required to restore the wages, hours, and working conditions of the Maersk employees. This court held in no uncertain terms that a successor has no obligation to accept its predecessor's labor agreement and reinstate the predecessor's terms and conditions of employment. Contrary to the majority's pronouncement, *Kallmann* states that such an order indeed constitutes a penalty.

> Nevertheless, we disagree with the extent of the remedial order. Even though under the facts of this case Kallmann had a duty to consult with the union before unilaterally charging [sic] the terms of employment, *as a successor employer he had no obligation to accept his predecessor's labor agreement*. The effect of the Board's order is to force Kallmann to abide by the terms of his predecessor's contract with the employees for the entire period of time Kallmann has owned the enterprise.

Id. (citations omitted) (emphasis added). The majority's attempt at distinguishing *Kallmann* on these facts is unavailing.

C

And finally, the Second, Fourth and District of Columbia Circuits have held that successors may set their own terms and conditions. *Saks & Co. v. NLRB*, 634 F.2d 681, 687-88 (2d Cir. 1980); *Nazareth Reg'l High Sch. v.*

NLRB, 549 F.2d 873, 881-82 (2d Cir. 1977);[1] *NLRB v. Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975); *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 672-76 (D.C. Cir. 1978). The majority, however, concludes that the Seventh Circuit's reasoning in *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305 (7th Cir. 1991) (enbanc [sic]) is persuasive and should be adopted in the instant case. The Seventh Circuit held that where a successor employer illegally refused to bargain with a predecessor's union, the Board's order to reinstate the contract in effect under the predecessor was a proper status quo ante remedy. It concluded that this was appropriate because, under the "perfectly clear" exception delineated in *Burns*, a successor that would have retained all or substantially all of its predecessor's employees, absent its discriminatory hiring practice, "loses the right to set the initial terms and conditions of employment and violates the Act if it unilaterally alters the predecessor's terms without first consulting the union." *Id.* at 1320.

In reaching its decision, the court split six to five. I cast my lot with the Seventh Circuit dissenters because (i) the majority's interpretation of the "perfectly clear"

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[1] The majority relies on *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858 (2d Cir. 1996), for the proposition that imposing a predecessor's employment agreement is remedial rather than punitive. However, *Staten Island* is distinguishable: "[T]he requirement that the Company pay former employees at the prior rates was plainly intended to be remedial, for it is *temporally limited*: (the Board's order requires payment at the prior rates only until the Company negotiates in good faith with the Union, either to agreement or to impasse.") *Id.* at 862 (emphasis added).

exception is inconsistent with the rationale in *Burns*; and (ii) the status quo ante remedy contravenes certain policies embedded within the NLRA regarding successor ownership. In his dissent, Judge Easterbrook properly argued that a bona fide sale of a business enables the successor to impose its own terms. He emphasized that the forfeiture of a successor's privilege to set the initial terms and conditions of employment is contrary to such policies as freedom of contract and the need to resuscitate ailing business.

> They have received wages from U.S. Marine to compensate them for the elimination of the antique manning tables and work rules. Now they receive a third salve, in back pay, for the loss of the work rules they enjoyed when Chrysler ran the plant, and U.S. Marine must use those rules from now on. None of this is remedial, and as a penalty it is not only too high but also interferes with the future operation of the plant. How much cleaner if the Board could levy a hefty fine, distribute the money to the workers, and be done. Instead, the Board's pretense of "remedy" has produced an order that may make profitable production impossible. By approving this masquerade we preserve featherbedding, increase the risks of taking over foundering firms, and frustrate the revival of aging plants. Neither American workers nor American consumers will welcome this consequence.

Id. at 1331.

Here, the remedy for discriminating against the eleven Maersk employees would be an order to hire them. It goes beyond mere remediation to impose the prior contract because New Breed would have had the

right to set its own terms and conditions had it hired those employees initially. Because New Breed violated its obligation as a successor to bargain, the proper remedy is a bargaining order, not reinstatement of the contract that existed under Maersk.

III

Because the majority's decision is contrary to the weight of authority construing both the law of the case doctrine and the Board's remedial power, I dissent from that part of the court's opinion which orders the status quo ante remedy.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

New Breed Leasing Corporation *and* International Longshoremen's and Warehousemen's Union; International Longshoremen's and Warehousemen's Union, Local 13; and International Longshoremen's and Warehousemen's Union, Local 63 and International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit. Cases 21-CA-29995, 21-CA-30003, and 21-CA-30299

June 30, 1995

DECISION AND ORDERS

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On February 14, 1995, Administrative Law Judge Clifford H. Anderson issued the attached Order Granting Motion Severing Case 21-CA-30299 and Decision in Cases 21-CA-29995 and 21-CA-30003. On March 21, 1995, Judge Anderson issued the attached decision in Case 21-CA-30299. The Respondent filed exceptions in Cases 21-CA-29995 and 21-CA-30003 and a supporting brief. The General Counsel filed limited exceptions in Case 21-CA-30299 and a supporting brief.[1]

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[1] The Respondent reinstated employees Larry Taylor, Tommie Nunez, and Fred Williamson pursuant to a Federal district court order in the Sec. 10(j) proceeding in Cases 21-CA-29995 and 21-CA-30003. The Respondent then discharged them shortly thereafter. The General Counsel alleged in Case 21-CA-30299 that these discharges violated Sec. 8(a)(5), (3), and (1) of the Act. The judge dismissed the complaint. There were no

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to grant the General Counsel's limited exceptions in Case 21-CA-30299 in their entirety. In all other respects, we affirm the judge's rulings, findings,[2] and conclusions[3] and adopt the judge's recommended Orders.[4]

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exceptions filed to the judge's dismissal of these complaint allegations. The General Counsel's limited exceptions requested that the Board make the judge's "conditional" findings "unconditional" and that we adopt these findings in connection with the compliance stage of Cases 21-CA-29995 and 21-CA-30003 and that Case 21-CA-30299 be reconsolidated with Cases 21-CA-29995 and 21-CA-30003. The Respondent filed no opposition to the General Counsel's limited exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found that but for the Respondent's desire to avoid being bound as a successor, the Respondent would have hired all of the former Maersk unit employees. These employees would have comprised all of Respondent's unit employees. In these circumstances, the Board finds that, but for Respondent's unlawful motive, Respondent would have had a "plan to retain all" of the Maersk unit employees. *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Therefore the Respondent was not free to change the prevailing terms and conditions of employment unilaterally.

[4] Although the Respondent has offered reinstatement to employees Larry Taylor, Tommie Nunez, and Fred Williamson,

ORDER RECONSOLIDATING CASES

The National Labor Relations Board orders the reconsolidation of Case 21-CA-30299 with Cases 21-CA-29995 and 21-CA-30003.

ORDER

The National Labor Relations Board adopts the recommended orders of the administrative law judge. In Case 21-CA-30299, the complaint is dismissed. The judge's rulings, findings, and conclusions, however, are reconsolidated with the judge's rulings, findings, and conclusions in Cases 21-CA-29995 and 21-CA-30003. In Cases 21-CA-29995 and 21-CA-30003 the National Labor Relations Board orders that the Respondent, New Breed Leasing Corporation, Compton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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pursuant to a Federal district court order in an action brought under Sec. 10(j) of the Act, that offer was not sufficient to qualify as a valid offer of reinstatement as required by our order in Cases 21-CA-29995 and 21-CA-30002. Thus, Taylor, Nunez, and Williamson are subject to the same affirmative remedies as all of the former Maersk unit employees. We further note, however, that we leave to compliance the issue of how many discriminatees will be entitled to reinstatement and backpay. See *Laro Maintenance Corp.*, 312 NLRB 155 fn. 3 (1993). Accordingly, we shall modify the judge's recommended Order to make clear that the reinstatement and make-whole provisions are subject to this limitation.

1. Substitute the following for paragraph 2(a).

"(a) Subject to the limitation set forth in the Board's decision, offer, in writing, immediate and full reinstatement to all of the former Maersk unit employees to the positions they held with the predecessor, discharging as necessary employees in the units not previously employed in the predecessor units or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for its predecessor, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. With the written reinstatement offers, Respondent shall notify these individuals in writing that it will recognize and bargain with the Unions as their exclusive representative."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 30, 1995

Margaret A. Browning, Member

Charles I. Cohen Member

John C. Truesdale Member

(SEAL) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

The National Labor Relations Act holds that an employer who employs a majority of employees from a bargaining unit employed by the former employer whose operations the new employer takes over must recognize and bargain with the labor organization that represented the predecessor's unit employees.

The Act further holds that an employer may not refuse to hire a predecessor's employees because it wishes to avoid recognizing and bargaining with a labor organization.

When New Breed Leasing Corporation took over the operations of Maersk Pacific at the 1412 Army Command

in April 1994, it improperly failed to hire the unit employees of Maersk. Had it hired those employees, a substantial majority of its employees in the units described below would have come from the predecessor units. Accordingly, New Breed Leasing Corporation from the very beginning of its operations on April 1, 1994, was obligated to recognize and bargain with the following labor organizations as the exclusive representatives of the following units of employees.

The following unit of New Breed Leasing Corporation's longshoremen and marine clerks employed at the Army Terminal is represented by International Longshoremen's and Warehousemen's Union, International Longshoremen's and Warehousemen's Union, Local 13 (Local 13) and International Longshoremen's and Warehousemen's Union, Local 63 (Local 63):

> All longshoremen and marine clerks employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

The following unit of New Breed Leasing Corporation's office clerical employees employed at the Army Terminal is represented by the International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit:

> All office clerical employees employed by Respondent at 1312 Medium Post Command

> located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

Given all these facts, we give you the following assurances:

WE WILL NOT fail and refuse to hire employees of the predecessor employer, Maersk Pacific, in order to avoid becoming obligated to recognize and bargain with the Unions as representatives of our unit employees.

WE WILL NOT refuse to recognize and bargain in good faith with the Unions as the exclusive representatives of the employees in the bargaining units set forth in this notice to employees.

WE WILL NOT unilaterally set terms and conditions of employment for bargaining unit employees and thereafter unilaterally change those terms and conditions of employment without notifying the Unions or providing them an opportunity to bargain respecting proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees and or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, subject to the limitation set forth in the Board's decision, offer in writing immediate and full reinstatement to all former Maersk unit employees to the

same positions they held with the predecessor, terminating if necessary any non-Maersk employees or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for the predecessor, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them. With our written reinstatement offers WE WILL notify these individuals in writing that we will recognize and bargain with the Unions as their exclusive representatives.

WE WILL remove from our files any reference to our unlawful refusal to hire the former Maersk unit employees and WE WILL notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

WE WILL, on request, bargain with the Unions as the exclusive bargaining representative of the employees in the appropriate bargaining units concerning terms and conditions of employment and, if understandings are reached, WE WILL embody such understandings in signed agreements.

WE WILL on request of the Unions, restore the status quo ante and rescind the unilateral changes in the unit employees' wages, hours, and working conditions that we implemented in the hiring of unit employees in March 1994 and all changes made thereafter, and make affected employees, including those whose employment is directed above, whole for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment

from the initial hire of unit employees in March 1994 and thereafter, until Respondent negotiates in good faith with the Unions to agreement or to impasse, in the manner set forth in the remedy section of the decision.

WE WILL preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to insure that the terms of this Order have been fully complied with.

NEW BREED LEASING CORPORATION

Jean Libby, Esq., for the General Counsel.

Gary F. Overstreet and Michael R. Goldstein, Esqs. (Musick, Peeler & Garrett), of Los Angeles, California, for the Respondent.

Steven Holguin, Esq. (Greenstone, Holguin, Garfield & Knox), of Los Angeles, California, for Charging Party Local 13.

Robert Remar, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for Charging Party Local 63 and Charging Party OCU.

ORDER GRANTING MOTION SEVERING CASE 21-CA-30299 AND DECISION IN CASES 21-CA-29995 AND 21-CA-30003

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the issues raised by the complaint in Cases 21-CA-29995 and 21-CA-30003 in trial on September 26 through 29, 1994, in Los Angeles, California. A separate hearing on the allegations of the complaint in Case 21-

CA-30299 was held in Los Angeles, California, on January 30, 1995. Posthearing briefs respecting the complaint in Cases 21-CA-29995 and 21-CA-30003 were submitted on November 10, 1994. Posthearing briefs respecting the complaint in Case 21-CA-30299 are due on March 7, 1995. The cases arose as follows.

On April 4, 1994, the International Longshoreman's [sic] and Warehousemen's Union (ILWU), International Longshoremen's and Warehousemen's Union, Local 13 (Local 13), and International Longshoremen's and Warehousemen's Union, Local 63 (Local 63) filed a charge with Region 21 of the National Labor Relations Board (the Board) docketed as Case 21-CA-29995 against New Breed Leasing Corporation (Respondent or the Employer). On April 19, 1993, the ILWU and Locals 13 and 63 amended their charge. On April 7, 1994, the International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit (Local 63 OCU and collectively with the ILWU, Local 13, and Local 63, as the Unions or the Charging Parties) filed a charge with Region 21 docketed as Case 21-CA-30003 against Respondent.

On May 27, 1994 the Regional Director for Region 21 issued an order consolidating cases, consolidated complaint, and notice of hearing consolidating Cases 21-CA-29995 and 21-CA-30003. Respondent filed an answer to the consolidated complaint dated June 10, 1994. The complaint and the answer were each further amended at the September 26, 1994 hearing.

The complaint respecting the two cases alleges and the answer denies that Respondent is a successor

employer with respect to two bargaining units represented by the Unions and that Respondent wrongfully failed and refused to hire the predecessor employer's unit employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. The complaint further alleges, and the answer denies, that Respondent had a bargaining obligation with respect to employees in the two units and violated its duty to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act in the following ways: (1) by failing to recognize and bargain with the Unions as representatives of its unit employees; (2) in initially establishing its unit employees' terms and conditions of employment without bargaining with the Unions; and (3) by failing to bargain with the Unions respecting changes from the predecessor's terms and conditions of employment.

On September 30, 1994, the Unions filed a charge docketed as Case 21-CA-30299 against Respondent and amended the charge on December 14, 1994. On November 25, 1994, the Regional Director for Region 21 issued a complaint respecting Case 21-CA-30299 (the latter complaint). The latter complaint alleges essentially the same violations of the Act as the complaint respecting Cases 21-CA-29995 and 21-CA-30003 (the earlier complaint) with the additional allegations here summarized that Respondent terminated three employees in late September and early October 1994 because of their union activities in violation of Section 8(a)(3) and (1) of the Act and changed work rules of unit employees without bargaining with the Unions in violation of Section 8(a)(5) and (1) of the Act.

On December 12, 1994, the General Counsel filed a motion to consolidate the latter complaint with the case then pending decision in the former complaint case. I granted the motion by order dated January 3, 1995. The hearing on the latter complaint was held on January 30, 1995. Posthearing briefs in Case 21-CA-30299, as of the time of the issuance of this decision, were due on March 7, 1995.

Severance of Cases

The parties have consistently indicated their strong desire that the decision on the complaint in Cases 21-CA-29995 and 21-CA-30003, if at all possible, not be delayed by the consolidation of the complaints. Counsel for Charging Parties Local 63 and OCU moved at the hearing in Case 21-CA-30299 to sever that case from Cases 21-CA-29995 and 21-CA-30003 in order to expedite issuance of the former decision. The other parties did not object.

I have determined that it will avoid unnecessary delay and effectuate the purposes and policies of the Act to sever Case 21-CA-30299 from Cases 21-CA-29995 and 21-CA-30003 and decide the former cases herein retaining the record with respect to Case 21-CA-30299 for further consideration and subsequent issuance of decision.

The Board has affirmed cases in which administrative law judges have severed cases during or after the evidentiary record has been concluded. See, e.g., *Money Radio*, 297 NLRB 698 (1990), and *Money Radio*, 297 NLRB 705 (1990). Indeed, the Board has granted motions to sever cases even after the issuance of an administrative law

judge decision on a consolidated matter. *Storer Cable TV of Texas*, 292 NLRB 140 (1988). I shall therefore grant the motion to sever below and will not further address Case 21-CA-30299 herein.

Respecting Cases 21-CA-29995 and 21-CA-30003

On the entire record concerning Cases 21-CA-29995 and 21-CA-30003,[1] including helpful briefs from the General Counsel, the Charging Parties, and Respondent respecting those cases, I make the following[2]

Findings of Fact

I. JURISDICTION

At all times since April 1, 1994, Respondent,[3] a New York corporation with an office and place of business in

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[1] The record respecting Cases 21-CA-29995 and 21-CA-30003, i.e., the record underlying the instant decision, includes all materials of record up to and including the filing of posthearing briefs in those two consolidated cases and, for purposes of procedural continuity, all motions and positions filed by the parties and orders issued thereafter to the date of the issuance of this decision bearing their case numbers. The instant record shall not include the transcript and exhibits of the hearing respecting Case 21-CA-30299 opened on January 30, 1995, other than those aspects respecting the motion to sever and the discussion and positions of the parties related thereto.

The record in Case 21-CA-30299 shall include all aspects of the record in Cases 21-CA-29995 and 21-CA-30003 including the instant decision.

[2] When not otherwise noted, the findings are based on the pleadings, the stipulation of counsel, or unchallenged credible evidence.

[3] Although there was some discussion and dispute respecting the existence of a separate corporate entity operating

Compton, California, has been engaged in the operation of a container freight station providing warehousing and interstate and foreign shipment of cargo pursuant to a contract with the United States Army respecting its 1312 Medium Port Command (the army terminal). Based on a projection of its operations, Respondent's business operation of the terminal will annually derive revenues in excess of $50,000 for the warehousing and transportation of freight in interstate and foreign commerce, under arrangements with various common carriers, each of which operates between California and various other States of the United States or between California and foreign countries.

Based on the above I find that Respondent at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find the International Longshoremen's and Warehousemen's Union (the ILWU), the International Longshoremen's and Warehousemen's Union, Local 13 (Local 13), the International Longshoremen's and Warehousemen's Union,

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the terminal, see for example Respondent's original answer, the parties agreed to deal exclusively with Respondent as the sole legal entity whose actions were in contest and amended their pleadings accordingly. Consistent with the pleadings and the manner in which the case was litigated, no findings are made with respect to any other entity acting as a subsidiary of or agent for Respondent in operating the terminal at relevant times.

Local 63 (Local 63 and, together with the ILWU and Local 13, the Longshore Unions), and International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit (Local OCU and, together with the ILWU Local 13 and Local 63, the Unions), and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The army terminal

For many years the United States Army Military Traffic Management Command through its 1312 Medium Port Command has maintained a container freight station and privately owned vehicle processing facility at 1620 Wilmington Avenue, Compton, California (the army terminal or the facility), for the purpose of consolidation and transshipment of Department of Defense service personnel's household goods, general cargo, and privately owned vehicles in Southern California. The Army for many years has contracted out the operation of the facility to private stevedoring contractors. Each of these contractors for many years until the events in question had recognized and bargained with the Longshore Unions respecting the longshore and marine clerks unit and with Local OCU respecting the office clerical employees.

For 3 years until March 31, 1994, Maersk Pacific Limited (Maersk) operated the army terminal pursuant to a contract with the Army. Maersk at relevant times was a member of the Pacific Maritime Association (PMA), an

organization of employers in the maritime industry. Maersk's army terminal employees were at all relevant times represented by locals of the ILWU.[4] As a member of the PMA, Maersk was bound to a collective-bargaining agreement with the Longshore Unions extending through July 1, 1996, respecting the following West Coast multi-employer bargaining unit (longshoremen and marine clerk's unit):

> All longshoremen and marine clerks employed by members of PMA and the employers who have authorized PMA to bargain on their behalf, including Maersk.

On the same basis Maersk was bound to an agreement with Local OCU through June 30, 1995, respecting the following unit (the office clerical unit or OCU):

> All office clerical employees employed at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the Labor Management Relations Act.

In the year to March 31, 1994, Maersk's army terminal longshoremen and marine clerk's unit contained approximately eight employees and its office clerical unit contained approximately four employees.

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[4] A local of the ILWU that represents statutory supervisors also represented one of Maersk's employees. Foreman Rick Ponce.

Each of the units described above has been at all relevant times appropriate within the meaning of Section 9(a) of the Act. Based on the record as a whole and the contracts in evidence, I find: (1) that at relevant times through March 31, 1994, the longshore locals were the exclusive representatives for purposes of collective bargaining of Maersk's longshoremen and marine clerk's unit employees and (2) that at relevant times through March 31, 1994, Local OCU was the exclusive representative for purposes of collective bargaining of Maersk's office clerical unit.

2. The Pacific Maritime Association

The Pacific Maritime Association (PMA) is an association of employers who have recognized the ILWU and its various locals as the representative of their employees engaged in the longshore industry on the West Coast of the United States. The Association negotiates and administers collective-bargaining agreements on behalf of its members as well as supplies related administrative and industrial relations support.

3. Respondent

Respondent is a corporation with headquarters in Greensboro, North Carolina. It operates facilities under contract with the government and others in various States of the United States. Louis DeJoy is the chief executive officer (CEO). Dennis Hunt is the manager of accounting and administration. William Lee is a consultant of

Respondent regularly involved in Respondent's commencement of new operations. The agency of these individuals was not in contest.

B. *Events*[5]

1. Respondent's activities respecting the 1994 bid to operate the army terminal

Maersk Pacific Limited's contract to operate the army terminal was to expire on March 31, 1994. Respondent, Maersk, and others submitted bids to operate the facility thereafter for a 2-year period commencing on April 1, 1994, with a 3-year option reserved to the government. Respondent's bid was dated January 24, 1994. It noted in part:

> Conversations have been initiated and provision made to work with the Pacific Maritime Association (PMA) to obtain both long-term and occasional workers. Membership in PMA assures the experience level of the work force and simplifies personnel administration. For long-term employees, a selection process will begin not later than March 15. These opportunities can be posted and selection conduced

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[5] Material conflicts in significant testimony are noted. When there is no essential difference in the testimony of witnesses regarding material events or when there is no conflict between witnesses or relevance to differing timing or versions of events, events are recited without evidentiary attribution. Unchallenged business records and other documents in evidence have provided substantial aid in establishing the timing of events.

> [sic] under PMA auspices to ensure employees of known skill levels.
>
> . . . .
>
> The New Breed site manager will be a participant on the implementation team. Supervisors will be selected and will begin training by March 21st and workers by March 28th. If existing employees are retained, they will be working already, and any added training will take place as soon as possible.

As the quoted portion of the bid noted, Respondent had initiated telephonic inquiries of PMA earlier in January 1994 and had as a result received a communication from PMA dated January 19, 1994, which included membership applications, booklets of association bylaws, and "copies of the current longshore, clerk, and forman agreements, by which you will be bound upon acceptance into [PMA] membership." There were apparently financial advantages to Respondent if it joined PMA sooner rather than later. Accordingly, on or about February 22, 1994, Respondent mailed to PMA a completed membership application and check for $1000 in payment of the required application fee.

By letter dated March 9, 1994, the PMA informed Respondent that its application for membership had been accepted by the PMA board of directors. The letter continued:

> In order to complete your membership, it is necessary for an officer of your company to affix

> his or her signature on the Bylaws of the Association. For this purpose two blank letter agreements are enclosed, one of which should be completed and returned to this office.

The PMA followed on March 11, 1994, with an additional letter detailing Respondent's financial obligations of membership and reporting and payroll procedures. Respondent did not at any time return the signed letter agreement.

Respondent's bid for the army terminal contract was favorably received.[6] On or about March 8, 1994, Respondent was advised by telephone that it had been awarded the contract. By March 15, 1994, the documents establishing its award of the contract had been physically received by Respondent.

2. Respondent's actions in preparing to assume army terminal operations

On or soon before Thursday, March 17, 1994, CEO LeJoy sent Hunt and Lee to Compton to commence Respondent's onsite transition efforts. Hunt and Lee arrived in Compton, California, on the [sic] March 17 and held a postaward conference with Lt. Colonel Dennis Faver, the commanding officer of the Army's 1312 Medium Port Command, and his staff. In the meeting the contract and the planned transition from Maersk to Respondent on April 1, 1994, were discussed. Colonel Faver testified that in that meeting:

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[6] Maersk's bid was rejected by the military due to a technical deficiency.

> I don't know who initiated it, but it did come up, as to what was going to be the future of the current work force. And one of the New Breed individuals said, "We haven't made a decision yet. We are keeping all of our options open."

With a day or two Hunt and Lee went to the local PMA headquarters and met with PMA Southern California representative Vince LaMaestra. Respondent's responsibilities and obligations under the collective-bargaining agreements as well as the existing state of industrial relations generally at the army terminal and the PMA's role in assisting Respondent in such areas were discussed. At one point LaMaestra brought ILWU Local 13 Secretary Treasurer Norman Tuck and another ILWU representative into the meeting and briefly introduced Hunt and Lee to the others as representatives of a "new member of PMA."

Hunt testified that he also arranged through Lee to place blind employment advertisements in the local paper – which ads were to appear the following week on March 23 or 24 – and to look for a place in which Respondent's staff could interview job candidates responding to the ads.

James Moynihan testified CEO LeJoy contacted him at his New Jersey home on the evening of March 17 and informed him that Respondent had been awarded the army terminal contract and, as earlier proposed. Moynihan would be Respondent's Compton operations manager. Moynihan testified that LeJoy discussed with him the specifics of his new position, but also told him that "there were decisions yet to be made involving labor, and I was not involved. . . . At that time I didn't know

exactly what the hiring process would be." Moynihan testified that he had further conversation by telephone with LeJoy on the evening of Saturday. March 19, respecting the operational needs of the Compton facility and the types of people needed. The next day, Sunday, March 20, Moynihan flew to Compton from New Jersey.

On Monday, March 21, Moynihan plunged into the operational aspects of the assumption of operations such as making leasing arrangements for necessary equipment. He testified that in the early part of the week he had no involvement in the recruitment process that was in the hands of two additional staff, John O'Neil and Ed Campbell. It was their task to contact and screen the applicants who would respond to Respondent's newspaper advertisements appearing on and after March 23 or 24.

Moynihan and Lee went to the offices of ILWU Local OCU's offices on March 21 for a meeting with Jerry Rich and Ibarra. The army terminal operation was discussed as well as the then current collective-bargaining agreements with Maersk. Rich testified that the New Breed agents explicitly indicated that they were going to retain the Maersk staff asserting, "they needed the people . . . the experienced people." Lee specifically denied any such intention had been expressed and Moynihan testified [sic] had no recollection of such statements ever being made. Moynihan testified, however, that at the meeting it was clear that the union representatives assumed that Respondent would sign the then current collective-bargaining agreements and further assumed that Respondent would retain the existing Maersk unit employees.

During this period, Respondent's employee Michael Woods was at the facility documenting Maersk's work procedures and attempting to learn the duties and responsibilities of various Maersk unit employees. In so doing he had conversations with various [sic] of the unit employees. Maersk employee Kevin Reilly testified that Woods discussed his job with him and he specifically asked Woods if Respondent was planning on replacing the Maersk employees. He testified that Woods told him that Respondent was not going to replace the current employees. Woods specifically denied both that he was ever asked such a question by Maersk employees or that he assured any Maersk employee of a job with Respondent. Maersk employee Linda Kennedy recalled that Woods, on learning that she was the only employee who could issue a necessary certification as part of the army terminal operations, asserted. "Well, I guess in the future we better make sure you don't get sick."

Maersk employee Bernis Gald testified that she had received a local county court subpoena in January requiring her appearance for jury duty on April 5, 1994. She testified she assumed as an employee who would be employed by Respondent that she needed to be at work during the transition from Maersk operations to Respondent's operations and therefore she raised the matter of the subpoena that required her appearance at court during the critical week of April 5 with both Lee and later Moynihan. She testified she requested that Respondent provide directly to the court, or to her for retransmission to the court, a letter of explanation that would allow her to postpone her jury service so that she would not be absent in the first days of Respondent's assumption of

operations. She testified that Lee told her it was important for all the workers to be present during the transition, but that since he was not going to be at the facility at relevant times, Moynihan would take care of the matter. Lee testified he did not recall a Maersk employee named Gald and did not recall ever being approached by anyone regarding a summons for jury service.

Gald testified that after speaking to Lee she spoke to Moynihan repeating what she had said to Lee and telling Moynihan she would make him a copy of the subpoena so he would have all the information necessary to take care of the matter. She testified that Moynihan said that would be fine and that he would pick up the subpoena from her later. Moynihan testified that Gald did in fact speak to him as she testified, but that he simply told her in response that "I didn't know what she thought my involvement in that would be and that I couldn't help her."

Gald testified that after her conversation with Moynihan she made a copy of the subpoena. She looked for Moynihan on several occasions over the next day or two, but he was not at the facility. Because she was off on Friday, March 25, 1994, on Thursday, March 24, she left the subpoena with fellow employee Linda Kennedy asking her to give it to him that Friday.

On Wednesday and Thursday, March 23 and 24, 1994, Respondent's blind advertisements seeking job applicants ran in the local papers. Applications responded over the next 2 or 3 days. Respondent's agents Campbell and O'Neil screened the replies, selected promising individuals, and interviewed selected applicants at a local hotel.

While these two made initial screenings, Hunt and DeJoy also looked at some of the submitted applicant resumes.

On Thursday evening, March 24, following the conclusion of what he described had been a very busy day, Moynihan left his hotel and went to a nearby bar. There he had a conversation with a Maersk employee, Eric Gonzales. The specifics of the conversation are in very substantial dispute. Gonzales testified that while the conversation was social and convivial he turned it to work matters. He testified that he asked Moynihan about Respondent's intentions regarding retaining Maersk employees. Gonzales testified that Moynihan told him that Respondent was going to "go with the Local 13 work force." He recalled Moynihan said, "Yes. I don't see any problem with the present work force there, that it is going to stay status quo." Gonzales testified that he identified specific employees of Maersk and told Moynihan of their concerns regarding their jobs such as Linda Kennedy. He recalled that Moynihan responded to his statements about Kennedy: "Oh. Linda is a very good worker, and I wouldn't want Linda to be upset. I should probably talk to her and let her know that her job wasn't going to be lost." Gonzales testified that Moynihan in turn asked questions of him respecting work arrangements of particular employees including Forman Ricky Ponce and that Gonzales explained what he could.

Moynihan recalled meeting Gonzales at the bar. He testified, however, that when Gonzales sought to introduce work matters into their conversation Moynihan protested saying he did not want to discuss work issues, Moynihan recalled the conversation was simply social and brief. He specifically denied that any work related

conversation occurred or that he made the statements attributed to him by Gonzales.

Gonzales, corroborated by the testimony of Maersk employees Linda Kennedy, Kevin Reilly, and Rick Ponce testified that on the morning of Friday, March 25, at work, he related the substance [of] his prior evening's conversation with Moynihan to Kennedy, Ponce, and all the clerical workers and marine clerks at work that day. In effect Gonzales told them not to worry about their jobs because Moynihan had told him Respondent was going to retain the Maersk staff. Gonzales testified that all the Maersk employees were concerned about their jobs because Respondent had made no announcement about whether they would be retaining the current work force and the changeover from Maersk to Respondent's operation of the army terminal was to occur the following week.

That same day, Friday, March 25, in Moynihan's recollection, Kennedy put a copy of Gald's subpoena on his desk. Moynihan denied knowing its purpose or taking any action respecting it. Kennedy testified that Moynihan took the subpoena from her and told her that he would be speaking to somebody "back east" about it.

Moynihan met with Colonel Faver on Friday. Colonel Faver testified that he asked what the intentions of Respondent were respecting the Maersk work force. He recalled that Moynihan told him that the decision on the work force would be made over the weekend by someone at headquarters – not him. Moynihan also recalled the conversation and the question from the Colonel. He agreed that he told the Colonel that he did not have an

answer about the Maersk employees because the decision had not been made on how to staff the facility. Moynihan testified, however, that at the time of this Friday workday conversation, he was aware that the following morning he was to begin personally giving interviews to job applicants screened by other Respondent staff from those who had responded to the newspaper ads.

A second conversation took place between Moynihan and Gonzales that is in dispute. Gonzales testified that he met Moynihan at the same bar on Friday evening:

> Jim came to the bar, and we both sat down there. And we were both having a drink, and he said, "I have got some bad news to tell you." I said, "Well, what is the bad news?" And he goes, "Well, I heard from the people up on top that I had no right to probably tell you anything about labor, that my job now was just to run the facility after it was set up."
>
> So, I said, "Wow, why this sudden change?" He said, "Well, to tell you the truth, I thought that I was going to be in charge of all the hiring, and my superiors are now telling me not to worry about the hiring, not to worry about the work force, that I had nothing to do with that." He goes, "I am going to be honest with you. I am really upset. I thought that I was going to have a lot more power than just the operating. I thought I was going to do the hiring or I would at least have a say so."
>
> And he said, "So, as of this conversation, if you see me walking around the warehouse and I don't talk to you, I don't have anything to tell you. So, you might as well look at it like if I am just not talking to you, it is not that I am doing it

> intentionally. And you might think that one day we could be friends or you might look at me as an asshole."
>
> And I said, "Well, if that is the way you look at it." I was pretty upset and left it at that. I didn't really have anything else to say to him because he sort of laid it out flat, and I accepted it and left it at that.

Moynihan recalled the conversation but testified that Gonzales initially seemed to be approaching him as a spokesman for Rick Ponce respecting Ponce's work arrangements and that Moynihan cut Gonzales off with the admonition that he was not there to discuss labor issues. Moynihan specifically recalled the conversation was otherwise social, very limited, and brief.

Moynihan testified that on Saturday, March 26, he received a "stack of resumes" of screened job applicants from the blind newspaper ads and commenced interviewing candidates. He spent the day entire [sic] interviewing. He testified that during the interview process he remained unsure whether Respondent would be hiring the Maersk unit employees or the individuals selected from those who responded to the blind newspaper advertisements. The two groups were exclusive, no Maersk employees had learned of Respondent's offsite interview process or responded to the advertisements.

Respondent took its final decision not to join PMA and not to hire the Maersk employees, according to Hunt, after casual conversations between Hunt and DeJoy, DeJoy and counsel, and DeJoy and others. DeJoy testified that his decision was made "close to the end of it," without placing a specific date on his decision. DeJoy

testified that ultimately the complexity and potential liability to Respondent of the commitments involved in joining PMA convinced him in the end not to join. He testified that the possibility that Respondent would be obligated to high cost labor over the entire west coast as a result of joining PMA was a factor in the decision. He specifically denied, however, that "any decision in recruiting the work force was based in any part on someone's having once been a Maersk employee or having been affiliated with any union."

On Sunday, March 27, in the afternoon or evening, Moynihan testified that he and DeJoy spoke by telephone. DeJoy told him a decision had been made not to join PMA and DeJoy instructed Moynihan to "go ahead and select from the people I had interviewed for employment." DeJoy's instructions were put into effect.

Eric Gonzales testified that on Monday morning, March 28, the first work day following his Friday evening conversation with Moynihan, he randomly informed his fellow employees at the army terminal of Moynihan's remarks to him. Gonzales was corroborated regarding both the conversations and concerning the specifics of Moynihan's remarks described by Gonzales, by Maersk employees Bernice Gald, Ricky Ponce, and Linda Kennedy.

Gald testified she has a conversation with Moynihan on Monday in which she reminded him of the subpoena matter and the letter he had agreed to have sent. She testified he responded not to her statements about the subpoena but rather said that he could not answer all of Gonzales' questions. When she responded that Gonzales

that [sic] had nothing to do with the jury subpoena and repeated her question respecting getting a letter sent to the court, Moynihan said he had faxed the subpoena to North Carolina. When Gald expressed concern respecting the short time remaining until her Monday, April 5, appearance date pursuant to the jury subpoena, Moynihan responded, in Gald's recollection, "Oh, that is no problem. My company is real good about Overnight Mail, and they will get the letter back to you."

Ricky Ponce testified that after Gonzales reported his conversation with Moynihan, he waited for Moynihan, and confronted him as he arrived at work. Ponce testified,

> I stopped [Moynihan] right at the foot of the doorway there, and I asked him. "What the heck is going on here? Eric [Gonzales] is telling me the whole story has changed, and we don't know if we are going to be here." I wanted to know what was going on.
>
> Q. And what did he say?
>
> A. He said – actually, he didn't know what was going on. He didn't know if he was going to be there. He mentioned something about he had just gotten married or something, and he didn't even know if he was going to move his wife over here, so he was caught in the dark and didn't know what the heck was going on.
>
> So, in turn, I told him, "Well, maybe you don't want us here, but being that you belong to PMA at the time" – I understood that they were under PMA – I told him, "We may not be here, but there will be an ILWU work force here, because you are under PMA. And what I am

> going to have to do is I am going to have to get in touch with my Union officials and we are going to go from there."
>
> And he mentioned something to the effect that, "We have dealt with ILA" – something with reference to ILA. And in turn, I turned about and I said, "Well, we are not ILA. We are ILWU." And I said, "I will talk to my Union officials, and I got to do what I got to do, and you got to do what you got to do." I put out my hand, and we shook hands, and we turned around and he walked one direction and I walked in the other.

Ponce also testified that on the same day he told Maersk Terminal Manager Constanti that it was possible that the Maersk work force would not be retained by Respondent.

On that Monday, consistent with his earlier promise to keep the Colonel informed, Moynihan met with Colonel Faver and told him that Respondent had decided to go with its own work force rather than hire the Maersk employees and that Respondent was conducting offsite job applicant interviews.

Moynihan testified that Respondent made up its mind respecting which applicants to offer employment on Tuesday, March 28, and made job offers to applicants on March 29 with some applicants being contacted on Wednesday, March 30. On Wednesday Moynihan again met with Colonel Faver. Colonel Faver testified that Moynihan

> indicated that the interviews appeared to be going well. He did make a statement – yes, he did make a statement that he was surprised that none of the current employees had requested an

interview or filed an application, whatever their process was.

Constanti, Moynihan, and Colonel Faver met on Thursday, March 31. Moynihan again indicated that Respondent was, in Colonel Faver's recollection, "going to go with our own work force, we are not going to retain this group of people." In Moynihan's recollection this was the first time he had informed anyone save Colonel Faver that Respondent was not going to retain the Maersk work force. There was discussion on how to disseminate the news to the Maersk staff and union officials who were arriving at the premises.

In the event Moynihan met with union officials and announced Respondent's intentions later that day. Thereafter Maersk employees were informed they would not be retained by Respondent. The union officials were displeased, the employees upset, but the day passed without grave incident. This was the last day any of the Maersk employees worked.[7]

3. Respondent's operation of the army terminal

On April 1, 1994, Respondent commenced operations of the army terminal with a staff of eight or nine employees[8] of

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[7] Subsequent events occurring pursuant to a Federal district court order in an action brought under Sec. 10(j) of the Act are not relevant to a determination of the merits of the March and April 1994 unfair labor practice allegations and are therefore not considered.

[8] The new employees, as noted above, were hired on March 28 and 29. Training, with Army assistance, took place on March 30 and 31.

whom three were office clericals. Respondent at no time has recognized or bargained with the Unions respecting any army terminal employee. Respondent neither bargained with the Unions respecting the setting of initial terms and conditions of its employees employment nor subsequent changes in those terms.

Although Respondent's terms and conditions of its army terminal employees' employment are similar to those applicable to Maersk employees till April 1, there is no doubt they differed in significant ways. Further, Respondent did not maintain the job descriptions and classifications of unit employees utilized by Maersk under its contracts with the Unions, but rather assigned employees with far less concern respecting particular work jurisdiction.

C. *Analysis and Conclusions*

1. Basic arguments of the parties

The General Counsel argues that Respondent failed to consider and hire Maersk's army terminal unit employees because of a desire to avoid being obligated to recognize and bargain with the Unions respecting the two Maersk army terminal bargaining units. In so failing and refusing, the General Counsel argues, Respondent has violated Section 8(a)(3) and (1) of the Act with respect to each Maersk unit employee. From this starting point, the General Counsel argues further that, had Respondent not violated Section 8(a)(3) and (1) of the Act as described, Respondent would have been obligated to recognize and bargain with the Unions as a successor employer. Further,

because the constructive successorship occurred before Respondent commenced operations. Respondent under Board law was obligated to bargain with the Unions respecting initial terms and conditions of unit employees. The General Counsel argues that Respondent's failure to recognize the Unions as the exclusive representative of the army terminal employees as well as its failure to bargain respecting both initial terms and all subsequent changes in terms and conditions of employment violated Section 8(a)(5) and (1) of the Act.

The Charging Parties take the same position as the General Counsel respecting the alleged violations of the Act described above, but make additional contentions. They argue that Respondent actually or constructively joined PMA and recognized and bargained with the Unions and was therefore obligated not only to recognize and bargain with the Unions, but also was legally bound to the PMA collective-bargaining agreements for their terms. Thus, the Charging Parties argue that the remedy for the violations found should include a requirement that Respondent be held a part of the PMA multi-employer unit and that Respondent be bound to the PMA-Union collective-bargaining agreements in force with respect to Maersk unit employees.

Respondent does not so much dispute the General Counsel or the Charging Parties' legal arguments as challenge the underlying factual assumptions necessary to sustain them. Thus, Respondent argues that the record contains insufficient credible evidence to suggest, let alone sustain, a finding that Respondent's hiring for the army terminal was other that [sic] customary, benign, and permissible under the Act. Given that no Maersk

employee was improperly denied employment by Respondent, Respondent argues no successorship obligation on Respondent's parts exists and no violations of the Act occurred.

2. Arguments of the Charging Parties respecting additional violations and or special remedies

The Charging Parties on brief present a scholarly argument that the facts and case law require that Respondent be held to have: (1) joined PMA; (2) become a part of the multiemployer bargaining unit; and (3) adopted and hence become bound to the relevant collective-bargaining contracts. A threshold issue is presented, however, by the fact that the General Counsel did not plead in his complaint nor did counsel for the General Counsel contend at the hearing that Respondent had ever joined PMA, failed to join PMA for improper reasons, or ever recognized the Unions or bargained with them. To the contrary, in colloquy at the hearing, counsel for the General Counsel made it clear that she specifically rejected each such argument.

The Charging Parties initially concede "that Section 3(d) of the Act vests the General Counsel with exclusive jurisdiction with respect to the prosecution of unfair labor practice complaints." They argue, however, that the Board in *Kaumagraph Corp.*, 313 NLRB 624 (1994), held the Board, not the General Counsel, is responsible for fashioning remedies for unfair labor practices and therefore the General Counsel's control over the complaint does not preclude litigation respecting what the appropriate

remedy should be for the violations alleged. In this respect the Charging Parties assert on brief at 23:

> [T]he evidence and caselaw support the conclusion that the appropriate remedy of restoration of the status quo ante by New Breed as a legal successor should include the requirement that New Breed reinstate or perfect membership in the PMA and adhere to its adoption of the [applicable collective bargaining agreements] in accordance with its clearly expressed intentions.

The Charging Parties correctly argue that the Board not the General Counsel is charged with the obligation under the statute to craft appropriate remedies for unfair labor practice violations. This principle, however, is not to be applied so broadly that it swallows the General Counsel's discretion in respect of the issuance of complaints. The decision in *Kaumagraph Corp.* and others of like ilk stand for the proposition that, once a complaint allegation is made by the General Counsel, all appropriate remedies for the violation may be considered, even if the General Counsel does not advance or even opposes a particular remedy. These cases do not challenge the fundamental notion, however, that if a particular violation of the Act is not alleged by the General Counsel and such a violation is necessary for a particular remedy to be invoked then the General Counsel has, by refusing to allege such a violation, precluded the Board from directing such a remedy.

The threshold issue to be decided here, therefore, is whether or not the remedy sought by the Charging Party, i.e., an order requiring Respondent to join the PMA and

be bound by the current collective-bargaining agreements, may be sustained by the current complaint or requires additional independent allegations of violations of the Act.

Considering the record herein and the case law on the question of an employer's membership in multiemployer associations, I find that the remedy sought by the Charging Parties may not be supported on the current complaint but rather requires the finding of additional violations of the Act not alleged in the complaint. More particularly I find that for any remedy to include directing Respondent to sign or adopt the contract as part of the PMA multiemployer unit, the complaint must have included an allegation that was sustained by the evidence that Respondent either had joined or wrongfully refused to join the PMA. Indeed the very cases cited by the Charging Parties for the proposition that the remedies the Charging Parties seek are appropriate involve specific complaint allegations by the General Counsel respecting such conduct. Thus, for example, *World Evangelism*, 248 NLRB 909 (1980), deals with a successor bargaining obligation. The issue of whether or not the employer in that case had bound itself to the successor contract was specifically alleged as a separate violation of the Act and handled as a separate violation of the Act by the administrative law judge, 248 NLRB at 916, rather than as a question of remedy.

Put another way, the remedy sought by the Charging Parties presupposes violations of the Act not contained in the complaint and expressly disavowed by the General Counsel. To hold that a remedy in the instant case should include an order directing Respondent to join or rejoin

the PMA as part of a status quo ante remedy for violations of Section 8(a)(5) of the Act implicitly suggests that Respondent should be held to have joined the PMA as a matter of law and its failure to acknowledge that fact and its legal consequences was wrongful. Counsel for the General Counsel expressly indicated at trial that such a contention was not being made. Similarly, to include a make-sign order requiring Respondent to sign the applicable PMA-Union contracts as part of the remedy directed in the case, requires a finding that Respondent wrongfully breached its obligation to sign such an agreement. Again the General Counsel did not contend Respondent had such an obligation nor include such allegations in the complaint.

Based on all the above, I find the complaint will not support the remedies the Charging Parties seek, irrespective of the question of whether or not the record would support such relief had the complaint included the allegations found necessary above. I find that what the Charging Parties seek is not simply to obtain a remedy for the violations alleged but rather to expand the scope of the complaint. Because the complaint is within the exclusive jurisdiction of the General Counsel, who has declined to adopt the violations of law the Charging Parties advance herein, I shall also decline to consider the arguments of the Charging Parties on the merits of the unfair labor practice contentions they advance. Accordingly, I shall not further consider the contentions of the Charging Parties in these regards.

3. Resolution of testimonial conflicts

Although the greater portion of evidence respecting events herein was not at material variance, several important conversations or portions of conversations were in dispute. Although the entire record including the demeanor of witnesses is relevant to and was a basis for resolving the evidentiary conflicts presented, the more important disputes are set forth separately below for purposes of greater understanding and clarity.

a. *The Moynihan-Gonzales contentions respecting their offsite conversations*

As described above, Eric Gonzales testified to two detailed conversations with James Moynihan on Thursday and Friday March 24 and 25 at a local bar. Moynihan agreed that he had the two conversations with Gonzales at the place and about the times indicated, but Moynihan specifically denied that either conversation dealt with work issues or that he made any of the work related comments attributed to him by Gonzales.

Although the two individuals conversed alone and neither witness's version of the conversation is susceptible to direct corroboration, the conversations were repeated to others. Thus, Gonzales testified that he reported each conversation to other Maersk employees the morning of the first workday after its occurrence. As noted above, several Maersk employees corroborated Gonzales testimony in this regard. I credit both Gonzales and the corroborating witnesses in this testimony and

find he made the reports to employees reciting his conversation with Moynihan substantially as he described in his testimony. This finding strongly supports Gonzales' version concerning what Moynihan said in their conversations because Gonzales would without doubt not have given detailed reports respecting Moynihan's remarks to the other employees unless the conversations occurred as he testified or unless he was involved in some elaborate plot too fantastic to reasonably contemplate on this record. Further supporting my finding here, I found Gonzales' demeanor to be significantly superior to that of Moynihan particularly during the portion of the latter's testimony at issue here.

In summary, based on the record as a whole, the demeanor of the two witnesses and the corroboration that Gonzales' testimony received through the testimony of witnesses who received his almost contemporary reports of Moynihan's statements to him, I credit Gonzales over Moynihan when the two differ. I find therefore that Moynihan on Thursday, March 24, told Gonzales that he intended to retain the Maersk staff and that he told Gonzales on March 25 that he had heard from his superiors that he had no right to tell Gonzales "anything about labor" and that he was not going to have anything to do with the initial hiring decisions.

b. *The subpoena issues*

Bernise Gald and Linda Kennedy testified as described above about various conversations with Lee and Moynihan concerning a subpoena Gald had received for jury duty. Moynihan and Lee, in essence, disputed the

specifics of the two Maersk employees' testimony. The version of events given by the two Maersk employees is the more coherent and logical and is mutually corroborative. Their demeanor was superior to that of Lee and Moynihan on the issue. Lee and Moynihan struck me in their testimony as simply preferring to deny or fail to recall actions and statements that they felt might be inconsistent with their employer's defense. The two Maersk employees to the contrary convinced me they were testifying truthfully about events they clearly recalled. Accordingly, I credit Gald and Kennedy over Lee and Moynihan when the testimony on the matter differs.

c. *Statements in contest respecting Respondent's intention to hire Maersk employees*

Union Officials Joe Ibarra and Jerry Rich contended either William Lee or James Moynihan was directly asked if Respondent was retaining the current Maersk employees and that one or the other specifically said that Maersk's employees would be retained by Respondent in the meeting of the four individuals at the union premises on March 21. Neither Moynihan nor Lee acknowledged either being asked if Respondent would retain the Maersk employees or asserting that Respondent would in fact do so.

I specifically credit Iberra and Rich and discredit Moynihan and Lee who, I believe, found it convenient to simply fail to recall statements made which they wished had not been made. Beyond the question of demeanor, which strongly favored Iberra and Rich in this aspect of their testimony, I find it very probable that the union

agents would have asked about the Maersk employees they then represented and would have remembered the favorable response of Respondent's agents. The issue of the employees' retention was a matter of import to the Union and the individuals in the represented bargaining units. Because Moynihan's testimony made it clear that he was sure that the union agents at the meeting believed that the Maersk employees would be retained, there is no question that the subject was in the minds of all at the meeting. Given all the above, I find little reason to doubt the union agents' testimony that they received explicit assurances in that regard from Respondent.

I reach the same conclusion for similar reasons respecting the contention of Maersk employee Kevin Reilly that Respondent's agent, Woods, in reviewing Reilly's duties at the workplace told him Maersk employees would be retained. I find it highly probable that a Maersk employee would regard it of primary importance to learn if his or her job were to continue into the following month and would ask an official of the new employer if his or her job was safe. Further, having received such an assurance, I do not believe that the employee would be inclined to miscall the answer received, nor do I believe that Reilly simply lied about the conversation. I was particularly impressed with the demeanor of the Maersk employees including Reilly and am convinced his testimony was consistent with his recollection of events.

I think that Woods, like other of Respondent's agents, gave initial assurances to Maersk employees that they would be hired and, when the subsequent events and

litigation made that conduct inconvenient to acknowledge, simply forgot that it had occurred. In denying the attributions of the employees, Woods, like Moynihan and Lee discussed above, struck me as a witness not testifying from a memory of events but rather denying inconvenient actions directly or through the mechanism of an asserted failure to recall.

4. Hiring issues – the 8(a)(3) and (1) allegations

a. *Argument of the parties respecting Respondent's hiring motivation*

The parties argued at trial and on brief at length regarding Respondent's motivation underlying its hiring of staff at the army terminal. Addressing the highlights of those arguments here, Respondent argues that as a commercial entity it has an established philosophy disfavoring wholesale hiring of the employees of the employers whose operations Respondent assumed. Further, Respondent argues that it has had a consistent practice of utilizing "blind" newspaper advertisements as a means of creating an initial pool of job applicants from which final hires were made. Respondent argues that its hiring at the army terminal, both with respect to its placement of newspaper advertisements and its nonsolicitation of Maersk's army terminal employees, was consistent with its past practice and therefore free from improper, unlawful, or antirepresentational considerations.

The General Counsel and the Charging Parties attack Respondent's argument in several ways. First, they argue that the past practices of Respondent were not in fact

followed at the army terminal. Thus, the prosecution emphasizes that Respondent in its bid documents specifically represented that it had made provisions to work [with] the PMA to acquire a skilled work force and further represented:

> For long-term employees, a selection process will begin not later than March 15. These opportunities can be posted and selection conduced [sic] under PMA auspices to ensure employees of known skill levels.
>
> . . . .
>
> The New Breed site manager will be a participant on the implementation team. Supervisors will be selected and will begin training by March 21st and workers by March 28th. If existing employees are retained, they will be working already, and any added training will take place as soon as possible.

Thus, the General Counsel argues that Respondent in the instant case had in effect publicly committed itself from the very beginning of its efforts to obtain the army terminal contract to the hire of the existing employees and that, whether by using the auspices of the PMA or the retention of the existing employees, Respondent was not following its past practices.

The General Counsel and the Charging Parties further argue that, unlike all of Respondent's earlier hiring experiences described in the record, Respondent's advertisement and job hire implementation in the instant case did not occur early on in the bidding process. Thus, the past practice of Respondent was to advertise for employment well before the operation was to be started and in

many cases even before Respondent was assured of receiving the work. In the instant case Respondent's hiring occurred well after the bid had been awarded [to] Respondent and within a very few days of the time Respondent was to commence operations.

The General Counsel and the Charging Party [sic] argue that the credible record evidence supports the conclusion that Respondent at all times intended to hire outside or nonpredecessor employees so as to avoid creating any obligation to recognize and bargain with the Unions. Thus the moving parties argue that Respondent's contacts with PMA and the Unions as well as the statements made by its agents to Maersk employees were simply part of an elaborate charade designed to conceal Respondent's true intention to hire outside employees and operate without recognizing and bargaining with the Unions until the last possible minute. The General Counsel argues Respondent's agents affirmatively deceived both the Maersk employees and the Union by asserting the Maersk employees would be hired while following a concealed parallel track of offsite interviews and hiring.

Respondent argues that, while it did give initial consideration to joining PMA and, consequently, recognizing the Unions, it ultimately did not join the PMA for business reasons which, in all events, are not under challenge by the General Counsel. Having made that decision, Respondent argues, it simply utilized its usual hiring practices and, indifferent to the source of its job applicants as former Maersk employees or no, hired those applicants it felt most qualified for the positions open without consideration of irrelevant factors such as applicants' former Maersk unit employee status or union

membership and without consideration of its potential bargaining obligations.

b. *Findings and conclusions*

(1) Respondent's creation of two hiring options

On this record and given the credibility resolutions noted above, I find as follows. It is clear that in the initial stages of the bid process, Respondent's agents, both as reflected in their contacts with PMA and in the representations, quoted above in its bid documents, either decided to or strongly considered joining PMA and adopting and applying the collective-bargaining contracts to its army terminal operations.[9] Part and parcel of this action was hiring through PMA's "auspices," which, it soon became apparent, included retaining Maersk unit employees.

It is also clear that, either a part of initial caution or as a result of second thoughts respecting its earlier decision,

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[9] Such a course is not wildly improbable even for employers who have no previous experience with represented units. The contract that Respondent was pursuing through its bid covered the wages of employees. Such an agreement would greatly facilitate staffing. Further as Justice White noted in *NLRB v. Burns International Security Services*, 406 U.S. 272 at 291 (1972):

> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union, but also to observe the pre-existing contract rather than to face uncertainty and turmoil.

Respondent endeavored to create a second option, that is the choice of neither joining PMA or [sic] using PMA to staff the operation. This management decision to create a second option occurred no later than its determination to place blind employment advertisements in a local paper. The testimony indicates that this occurred no later than March 17 or 18. The record seems clear that each option was still under consideration at that time. Thus, Hunt or Lee told Colonel Faver in their March 17 meeting, in Colonel Faver's recollection[10] that I credit, that no decision on "the future of the current work force" had as yet been made by Respondent. This is consistent with Moynihan's version of events. He testified that he was told by CEO LeJoy that same day that "there were decisions yet to be made concerning labor."

From the testimony it is also clear that a final decision by Respondent's highest level of management respecting retention of the Maersk staff had still not been made by Friday, March 25. Colonel Favor [sic] testified that Moynihan told him on that day that Respondent's decision respecting the work force would be made by headquarters that coming weekend. Moynihan and LeJoy each testified that the final decision was made that weekend.

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[10] Colonel Faver was a no-nonsense, straight forward witness with an impressive demeanor, firm recollections, and no evident stake in shaping his testimony to favor any particular point of view. I found his testimony highly credible and have relied on it heavily in reaching my findings.

(2) Respondent's hiring decisions

(a) *The legal standard to be applied*

None of the above findings respecting timing are inconsistent with either the General Counsel and the Charging Parties' or Respondent's argued view of Respondent's motivation in hiring. Given my rejection of the Charging Parties' argument that Respondent was obligated to join the PMA as precluded by the General Counsel's contrary position, Respondent's argument that, once having decided not to join PMA, it thereafter simply hired employees consistent with its past practice based on an objective evaluation of their merits irrespective of their former status as Maersk unit employees, is not implausible and, if sustained, defeats the 8(a)(3) allegations of the complaint.

The General Counsel, having taken the position that Respondent's decision not to join the PMA was not improper, argues, however, that Respondent further specifically determined not to hire the predecessor's (i.e., Maerck's [sic]) employees in order to avoid being obligated as a successor to recognize and bargain with the Unions. Thus, the General Counsel argues that the Maersk employees were deliberately not hired because of their union activities and the fact of their union representation. Thus, the General Counsel argues that Respondent engaged in a course of conduct designed to avoid hiring Maerck [sic] employees in violation of Section 8(a)(3) and (1) of the Act.

The burden of proof respecting the issue of Respondent's motivation in hiring is squarely born [sic] by the General Counsel. In a situation such as that presented

herein the Board applies the causation test enunciated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See, e.g., *Champion Rivet Co.*, 314 NLRB 1097 (1994). Under the *Wright Line* standard the General Counsel is required to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision not to hire the predecessor's employees. If this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Further, the Board noted in *U.S. Marine Corp.*, 293 NLRB 669 at 670 (1989):

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor[']s employees from being hired as a majority of the new owner's overall work force to avoid the Board's sucessorship doctrine.[3]

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[3]*Houston Distribution Service*, 227 NLRB 960 (1977); *Lemay Caring Centers*, 280 NLRB 60 (1986), enfd. mem. 815 F.2d 711 (8th Cir. 1987).

(b) *Conclusions respecting Respondent's motivation in hiring*

(i) The General Counsel's prima facie case

Applying *Wright Line* with the quoted factors set forth in *U.S. Marine* in mind, I find the General Counsel has met his burden to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision not to hire the Maersk employees. I do so for the following reasons.

First, I accept the General Counsel and the Charging Parties' argument that the past practice of Respondent respecting hiring is largely inapplicable to the instant situation because of the very different timing and circumstances presented. Thus, the lateness of the hiring relative to its assumption of operations, the fact that Respondent had earlier announced an intention to use PMA auspices to accomplish hiring and the fact that it had made it clear to the Maersk employees and the Union that the Maersk employees would be retained – all these factors distinguish the instant case from Respondent's previous hiring experiences.

Second, and most critical to my finding, I find that Respondent took two actions that together precluded hire of Maersk employees. Thus, I find that Respondent initially set up two exclusive pools of potential army terminal employees – those who responded to its blind newspaper advertisements and the Maersk employees – and affirmatively acted to keep the Maersk employees from being aware of or becoming part of the former

group of newspaper advertisement responders. Thus, as found above, Respondent's agents took various steps to convince the Unions and Maersk employees that the Maersk employees would be retained. These assurances combined with Respondent's failure to divulge the existence of the offsite application and hiring process effectively precluded the Unions or Maersk employees from ever becoming aware of or participating in the offsite hiring process.

In making this finding I specifically reject Respondent's contentions that Maersk employees could have applied for and would then have been considered for employment. Respondent's affirmative acts of deception, as found above, fatally impeach this assertion. I reject as improbable, incredible, and insincere Moynihan's assertion to Colonel Faver that he was surprised that no Maerck [sic] employees had applied for employment. I also find the testimony of Moynihan that he referred Maersk employees to headquarters when they asked about the employment process at the very time other Respondent agents were screening applicants off site in Compton supports my finding. Given the fact that Moynihan knew Gonzales had repeated to Maersk employees Moynihan's barroom statements to Gonzales that the Maersk employees were to be retained, Moynihan well knew those employees were unlikely to take active steps to apply for jobs in essence already promised them.

Respondent's second action was to insure that only non-Maersk employees were hired for Respondent's

army terminal operations. Having created and maintained two separate pools[11] of potential hirees, Respondent's chief executive officer instructed his agents to hire all employees from the pool that excluded the Maersk employees. In the March 27, 1994 conversation in which LeJoy informed Moynihan that Respondent would not be joining the PMA, he also instructed Moynihan whom to hire. Moynihan testified LeJoy told him to "go ahead and select from the people I had interviewed for employment." At no time was the possibility of belatedly informing Maersk employees of the hiring process or otherwise considering offering employment to Maersk employees ever contemplated. Thus, Respondent decided to hire only from a pool of applicants from which all Maersk employees had been excluded. This is strong evidence in my view that Respondent was motivated to exclude all Maersk employees from potential hire.

Even if Respondent's constructive exclusion of the Maersk employees from the pool of applicants was benign up to this point, which I do not find, Respondent did not thereafter solicit applications from Maersk employees who, being unaware of the process, did not apply. Indeed, Moynihan, even as late as Monday, March 28, the day following his receipt of LeJoy's instructions to begin hiring from the newspaper applicant pool, continued to actively mislead Maersk employees into believing

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[11] There is no business justification for the creation of two pools of potential employees apparent on this record, nor does Respondent advance one. Rather, Respondent argues that its job hires were based on individual determinations of applicant merit and that Maersk employees who applied would have been evaluated on their individual merits as were other applicants.

that they were being retained by Respondent. Thus, Moynihan on that day, in Gald's credited testimony, continued to represent to her that Respondent was taking care of her jury duty obligation so that she could be present at work during the transition to Respondent's operation of the army terminal. This continuing pattern of misstatements to employees, clearly intended to create the impression that they would be hired by Respondent, even after a specific decision had been made and communicated to Moynihan that the Maersk employees were not to be retained, further demonstrates that Respondent sought to exclude all Maersk employees for its applicant pool.

I find from all of the above compelling evidence that Respondent intended to avoid hiring Maersk employees and undertook a course of conduct designed to and successful in reaching the intended result – the exclusion of all Maersk employees from the selected hiring pool. Given the fact that the timing of the decision not to hire Maersk employees was coterminous with Respondent's decision not to join PMA, a strong inference may be drawn, and which on this record I do draw, that the reason for the decision sounded in the representational consequences of the hiring choices. Respondent simply wanted to avoid any of the numerous complications that would arise if a successorship obligation was created as a result of the hiring of Maersk employees.[12]

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[12] I reject Respondent's arguments that it was essentially ignorant of the legal consequences of hiring or not hiring a majority of the predecessor's employees in a previously union represented bargaining unit. Respondent's management

(ii) Respondent's argument that it would not have hired the Maersk employees irrespective of the fact of their representation by the Unions

Once the General Counsel has established a prima facie case under *Wright Line*, the burden shifts to Respondent to demonstrate that the same action would have taken place even in the absence of protected conduct. Thus, Respondent bears the burden of demonstrating that the Maersk employees would not have been hired, even had they never been represented by the Unions.

Two general types of arguments were made by Respondent that the Maersk employees would not have been hired. The first, that generally Respondent did not approve of hiring predecessor employer employees as a class because of possible trouble from the former employer, is not persuasive in the instant case because, as discussed in detail above, Respondent had widely announced its intention of retaining the employees and because the lateness of the hiring decisions made the hiring of experienced staff highly desirable. Past practice was simply not controlling in the instant, significantly different circumstances.

Respondent argued further that the initial impressions of the Maersk employees taken by Respondent's

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officials did not impress me as either ignorant or naive respecting the commercial world. Further, as noted above, CEO Lejoy took legal counsel before deciding not to join the PMA or retain the Maersk staff.

agents in their initial visits to the premises and in conversations with PMA agents, Maersk agents, and other individuals was that they were a dismal and inefficient lot who were unworthy of hire. Respondent is entitled to form subjective impressions of employment applicants and to hire them or not hire them based on any reason or reasons other than those prohibited under the Act. Had Respondent come to dislike and refuse to hire the Maersk employees either as a class or individually for benign reasons, Respondent's defense would be sustained and the 8(a)(3) complaint allegations dismissed.

Respondent's assertions must be addressed in two parts. First, to the extent Respondent is asserting that the Maersk employees were properly rejected as a class, based on their work quality, Respondent has not sustained its burden of proof. To the contrary, Moynihan's statements to Gonzales, as found above, establish that Moynihan, the onsite manager who had a major role in the final selection of new employees, thought well of at least some of the Maersk employees and intended to retain them if he could. I simply do not find the testimony of Respondent's witnesses respecting their unfavorable impressions of the Maersk work force generally is sufficient to overcome the substantial evidence that there were Maersk employees who were viewed objectively and subjectively as worthy of consideration by Respondent. Indeed, Respondent's argument that any Maersk employee who had applied for employment would have been considered on his or her own merits, supports my finding that the Maersk employees, as a class, were not and could not properly have been rejected by Respondent.

Respondent's argument also suggests that, if some or all of the Maersk employees had applied for employment with Respondent, they would have been rejected individually based on their individual merits as compared to the individuals actually hired. Even when, as here, a general finding of impermissible motivation in hiring has been made, a respondent may show that individual predecessor employees would not have been hired under any circumstances. See, e.g., *Honda of Hayward*, 307 NLRB 340 (1992).

Respondent on this record, however, has not established sufficient credible evidence that, had any particular Maersk employee applied for employment with Respondent, that person would have been rejected on his or her merits irrespective of the union representation issue. Not only does Respondent bear the burden on the issue as set forth in *Wright Line*, it also bears the additional burden resulting from the fact that it was its unlawful conduct that caused the Maersk employees to be ignorant of and hence not participant in the offsite interview and hiring process as all those who were ultimately hired did. Thus, it is a matter of speculation what would have occurred had Maersk employees participated in the offsite interview and hiring process. The Board has long held that to the extent there is uncertainty with respect to what a respondent would have done absent its unlawful purpose, such uncertainty must be resolved against the wrong doer who cannot be permitted to benefit from its unlawful conduct. *Love's Barbecue Restaurant No. 62*, 245 NLRB 768 (1979). Given the essential paucity of evidence respecting particular Maersk employees and

what would have happened had they applied, I find Respondent's arguments in this respect fail on their facts.

(iii) Summary and conclusions

In summary, I have found that Respondent undertook a course of conduct that was designed to prevent and successful in preventing Maersk unit employees from participating in the offsite interview and hiring process that was the exclusive source of Respondent's employees for its army terminal operations. I further found that Respondent['s] motivation for this exclusion was a desire to insure that no Maersk employees were hired so as to avoid any possible obligation as a successor employer to recognize and bargain with the Unions who represented the Maersk employee bargaining units. Respondent's failure to hire the Maersk unit employees because of the fact of their union representation and the desire to avoid an obligation to recognize and bargain with the Unions as a successor employer is a violation of Section 8(a)(3) and (1) of the Act. The General Counsel's complaint paragraph 11(a) is therefore sustained.

5. The bargaining issues – the 8(a)(5) allegations

a. *The existence of a bargaining obligation*

Because the General Counsel makes no contention that Respondent ever recognized the Unions as representatives of its employees, the only theoretical mechanism for obligating Respondent to recognize and bargain with

the Unions is a successor employer's obligation to recognize the union or unions that represented its predecessor's employees. Under the Supreme Court's doctrine established in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), and its progeny, a new employer is bound to recognize and bargain with the labor organization that represented the predecessor employer's employees under certain conditions.[13] Relevant here is the successorship requirement that the new employer have hired a majority of the predecessor's work force in the relevant units.

Respondent in fact hired none of the predecessor's work force. The General Counsel has alleged and I have found, however, that Respondent wrongfully failed to hire the predecessor's unit employees. In such circumstances the Board determines what the employee compliment would have been had the Act not been violated and applies its successorship standards to that situation. *Honda of Hayward*, 307 NLRB 340 (1992). As found above on this record I have concluded that had Respondent not violated the Act it would have hired the Maersk unit employees who would then have constituted a majority, if not the entirety, of Respondent's employees in each of the two bargaining units at issue. Given the constructive majority existing in each bargaining unit, I find that Respondent was a successor to Maersk regarding each

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[13] Many of the requirements of successorship are not in dispute. Thus, for example, Respondent's army terminal operation was essentially the same as Maersk's and Respondent's commencement of operations followed immediately on Maersk's cessation of operations without hiatus.

unit and therefore was obligated to recognize and bargaining [sic] with the Unions concerning each.

b. *The time of attachment of the bargaining obligation*

A separate issue arises respecting the specific date Respondent's bargaining obligations respecting each unit attached. The normal successorship bargaining obligation arises at the time the successor employer has hired a majority of the predecessor's employees. The obligation does not in such situations arise at the onset of Respondent's hiring, but only after a sufficient number of employees have been hired to make the final numeric outcome known. The fact that the bargaining obligation does not typically attach at the very beginning of an employer's hire of employees is important because, if an employer is not obligated from the inception of its hiring to bargain with a labor organization concerning terms and conditions of employees' employment, it is free to set initial terms and conditions of employment of its employees and to change those conditions without bargaining with the union until the time the bargaining obligation attaches.

A different situation obtains in those situations when a new employer makes it clear before any hiring occurs that it intends to retain the predecessor's employees. In such a situation, it is obvious from the onset that the union will represent a majority of the successor's employees and the bargaining obligation therefore attaches immediately, before employees have been hired. In such a situation the employer is not free to set initial

terms and conditions of employment without bargaining with the labor organization or organizations that represent the employees. In such a situation, the terms of employment maintained by the predecessor must be carried forward unless and until bargaining has occurred. The Board discusses these timing issues and their consequences in *Spruce Up Corp.*, 209 NLRB 194 (1974).

In the instant case I have found that Moynihan told an employee, before Respondent hired any employees, that Respondent would retain all the Maersk employees. I have also found that Respondent's subsequent determination not to retain the Maersk [employees] was improper and a violation of the Act. I find it is appropriate on this record to rely on the statement of Moynihan and the other evidence that, but for the desire to avoid being bound as a successor, Respondent would have hired the Maersk work force and hold Respondent to have determined, before any unit employees were hired, that the predecessor's unit complements would be retained.

Given this factual finding, I further find that Respondent was obligated from the commencement of its operations, and before it hired any non-Maersk unit employees, to recognize and bargain with the Unions respecting the employees in the two bargaining units noted above. Thus, Respondent was obligated to bargain with the Unions about the terms and conditions of unit employees it offered the unit employees it hired and was obligated to obtain the agreement or the Unions or bargain to impasse on any changes in those employees' terms and conditions from the Maersk terms.

c. *Conclusions*

I have found that Respondent was obligated as a successor to recognize and bargain with the Unions respecting the bargaining units they represented with the predecessor employer, Maersk, and that Respondent was obligated to do so from the onset of its hiring of unit employees. There is no dispute that Respondent never recognized nor bargained with the Unions concerning unit employees' terms and conditions of employment nor matched the terms and conditions of employment earlier applied to Maersk's unit employees under the PMA contracts with the Unions.[14] Once Respondent's operations were underway, it continued to change unit employees' terms and conditions of employment in material ways without recognizing, notifying, or providing the Unions an opportunity to bargain respecting the changes.

Respondent's failure to recognize and bargain with the Union's [sic] concerning the two bargaining units, as noted above, including its failure to bargain respecting the setting of unit employees[']' initial terms and conditions of employment and subsequent changes in those terms and conditions of employment, violated Section 8(a)(5) and (1) of the Act. Accordingly, and based on the entire

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[14] Based on the uncontradicted testimony of various witnesses and the stipulations of the parties, I find that Respondent set its own terms and conditions of employment that were in material aspects different from those Maersk unit employees had enjoyed under the PMA contracts.

record, I sustain the General Counsel's complaint allegations 8, 9, 10(b), and 11(b), (c), and (d).[15]

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. With respect to the appropriate remedy of the violations of Section 8(a)(3) and (5) of the Act, I shall follow the teachings of *Fremont Ford*, 289 NLRB 1290, 1297-1298 (1988).

I shall order Respondent to offer the former Maersk unit employees in writing immediate, full, and unconditional employment in the unit positions they occupied when employed by Maersk, terminating unit employees not formerly employed by Maersk as necessary, if such positions no longer exist, they shall be offered substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed if initially hired at the commencement of Respondent[']s operations, and to make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth*

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[15] The General Counsel has alleged in pars. 10(a), 13, and 15 of the complaint that Moynihan's statement to the Unions – not to employees – that it would be futile for them to request recognition as the unit employees' representative violated Sec. 8(a)(1) and (5) of the Act. In the absence of citation of authority finding such conduct violative of the Act, I decline to sustain the violations alleged.

Co., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall further order Respondent give all unit employees written notice that it will recognize and bargain with the Unions as specifically identified above as the exclusive representative of employees in each unit. I shall also order Respondent to remove from its records all references to its refusal to employ the Maersk employees and notify each of them in writing that this has been done and further assure them that the fact of their original nonhire will not be used against them in the future.

I shall order Respondent to recognize and, on request, bargain with the Unions identified above as the exclusive representative of all its employees in each unit. I shall also order Respondent, on the Unions' request, to restore the status quo ante with respect to each unit, to rescind the unilateral changes, including all initial terms and conditions of employment different from those in place under Maersk's agreement with the Unions, in unit employees' wages, hours, and terms and conditions of employment implemented on and before April 1, 1994, and subsequently; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes in their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall determine all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1970).

Respondent shall reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from Respondent's failure to make these payments.

In view of the widespread and egregious nature of Respondent's violations of the Act, I shall also include a broad cease-and-desist order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

On the basis of the above findings of fact and the record as a whole, I make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are, and each or [sic] them is, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire the unit employees employed by Maersk in order to avoid an obligation to recognize and bargain with the Unions as a successor employer.

4. At all times since the commencement of Respondent's operations, the Unions, as set forth below, have been the exclusive representative for purposes of collective bargaining of Respondent's employees in the following units:

The longshore and marine clerks unit represented by the Longshore Locals:

> All longshoremen and marine clerks employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

The office clerical unit or OCU represented by Local OCU:

> All office clerical employees employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

5. Commencing in March 1994 and continuing to date, Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct:

(a) Failing and refusing to recognize the Unions as the exclusive representatives of employees in the units described above for purposes of collective bargaining.

(b) Failing and refusing to meet and bargain with the Unions respecting the setting of initial terms and conditions of employment of unit employees.

(c) Unilaterally and subsequent changing both initial and subsequent terms and conditions of employment for unit employees without notifying the Unions of such initial terms and subsequent changes nor affording them an opportunity to bargain respecting such initial terms and changes.

6. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDERS

ORDER GRANTING MOTION TO SEVER CASE 21-CA-30299

The Charging Parties' Motion to Sever is granted. Case 21-CA-30299 is hereby severed from Cases 21-CA-29995 and 21-CA-30003. Case 21-CA-30299 shall remain before the Administrative Law Judge pending decision.

ORDER IN CASES 21-CA-29995 AND 21-CA-30003

The Respondent, New Breed Leasing Corporation, Compton, California, its officers, agents, successors, and assigns, shall

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[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to hire the unit employees of the predecessor employer, Maersk, in order to avoid becoming obligated to recognize and bargain with the Unions as representative of unit employees.

(b) At all times since March 1994 refusing to recognize and bargain in good faith with the Unions as the exclusive representative of the employees in the bargaining units set forth below by:

(1) Failing to recognize the Unions as representative of unit employees.

(2) Failing to meet and bargain with the Unions respecting terms and conditions of employment for unit employees.

(3) Unilaterally setting terms and conditions of employment for bargaining unit employees and thereafter unilaterally changing those terms

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer in writing immediate and full reinstatement to all of the former Maersk unit employees to the positions they held with the predecessor discharging as necessary employees in the units not previously employed in the predecessor units or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or

privileges previously enjoyed while working for its predecessor, and make them each of them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. With the written reinstatement offers. Respondent shall notify these individuals in writing that it will recognize and bargain with the Unions as their exclusive representative.

(b) Remove from its files any reference to the unlawful refusal to hire the Maersk unit employees and notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(c) On request, bargain with the Unions as the exclusive bargaining representative of the employees in the following appropriate units concerning employees' terms and conditions of employment and, if understandings are reached, embody said understandings in signed agreements:

The longshore and marine clerks unit represented by the Longshore Locals:

> All longshoremen and marine clerks employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

The office clerical unit or OCU represented by Local OCU:

> All office clerical employees employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

(d) On request of the Unions, restore the status quo ante of unit employees, rescind the unilateral changes in the unit employees' wages, hours, and working conditions that were implemented in the hiring of unit employees in March 1994 and thereafter, and make all affected employees, including those whose employment is directed above, whole for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in March 1994, until it negotiates in good faith with the Unions to agreement or to impasse, in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to insure that this Order has been fully complied with.

(f) Post at its Compton, California facility copies of the attached Notice marked "Appendix."[17] Copies of the

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[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by

notice, on forms provided by the Regional Director for Region 21, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

Dated at San Francisco, California, February 14, 1995.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

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Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

The National Labor Relations Act holds that an employer who employs a majority of employees from a bargaining unit employed by the former employer whose operations the new employer takes over must recognize and bargain with the labor organization that represented the predecessor's unit employees.

The Act further holds that an employer may not refuse to hire a predecessor's employees because it wishes to avoid recognizing and bargaining with a labor organization.

When New Breed Leasing Corporation took over the operations of Maersk Pacific at the 1412 Army Command in April 1994, it improperly failed to hire the unit employees of Maersk. Had it hired those employees, a substantial majority of its employees in the units described below would have come from the predecessor units. Accordingly, New Breed Leasing Corporation from the very beginning of its operations on April 1, 1994, was obligated to recognize and bargain with the following labor organizations as the exclusive representatives of the following units of employees.

The following unit of New Breed Leasing Corporation's longshoremen and marine clerks employed at the Army Terminal is represented by International Longshoreman's [sic] and Warehousemen's Union, International Longshoremen's and Warehousemen's Union,

Local 13 (Local 13) and International Longshoremen's and Warehousemen's Union, Local 63 (Local 63):

> All longshoremen and marine clerks employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

The following unit of New Breed Leasing Corporation's office clerical employees employed at the Army Terminal is represented by the International Longshoremen's and Warehousemen's Union, Local 63, Office Clerical Unit:

> All office clerical employees employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

Given all these facts, we give you the following assurances:

WE WILL NOT fail and refuse to hire employees of the predecessor employer, Maersk Pacific, in order to avoid becoming obligated to recognize and bargain with the Unions as representatives of our unit employees.

WE WILL NOT refuse to recognize and bargain in good faith with the Unions as the exclusive representatives of the employees in the bargaining units set forth on the proceeding page of this notice to employees.

WE WILL NOT unilaterally set terms and conditions of employment for bargaining unit employees and thereafter unilaterally change those terms and conditions of employment without notifying the Unions nor providing them an opportunity to bargain respecting proposed changes

WE WILL NOT in any other manner interfere with, restrain, or coerce employees and or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer in writing immediate and full reinstatement to all former Maersk unit employees to the same positions they held with the predecessor, terminating if necessary any non-Maersk employees or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed while working for the predecessor, and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them. With our written reinstatement offers, WE WILL notify these individuals in writing that we will recognize and bargain with the Unions as their exclusive representatives.

WE WILL remove from our files any reference to our unlawful refusal to hire the former Maersk unit employees and WE WILL notify these employees in writing

that this has been done and that this unlawful conduct will not be used against them in any way.

WE WILL, on request, bargain with the Unions as the exclusive bargaining representative of the employees in the appropriate bargaining units concerning terms and conditions of employment and, if understandings are reached, WE WILL embody such understandings in signed agreements.

WE WILL on request of the Unions, restore the status quo ante and rescind the unilateral changes in the unit employees' wages, hours, and working conditions that we implemented in the hiring of unit employees in March 1994 and all changes made thereafter, and make affected employees, including those whose employment is directed above, whole for any and all losses they incurred by virtue of the unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from the initial hire of unit employees in March 1994 and thereafter, until Respondent negotiates in good faith with the Unions to agreement or to impasse, in the manner set forth in the remedy section of the decision.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records and other records and documents necessary to analyze the amount of backpay and other moneys due under the terms of this Order and to insure that the terms of this Order have been fully complied with.

NEW BREED LEASING CORPORATION

Ami Silverman and *Jean C. Libby, Esqs.* for the General Counsel.

Gary F. Overstreet and *Michael R. Goldstein, Esqs. (Musick, Peeler & Garrett)*, of Los Angeles, California, for the Respondent.

Steven Holguin, Esq. (Greenstone, Holguin, Garfield & Knox), of Los Angeles, California, for Charging Party Local 13.

Robert Remar, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of San Francisco, California, for Charging Parties Local 63 and 63 OCU.

DECISION

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned matter in trial in Los Angeles, California, on January 30, 1995. Posthearing briefs were due on March 7, 1995. The case arose as follows.

On April 4, 1994, the International Longshoreman's [sic] and Warehousemen's Union (the ILWU), International Longshoremen's and Warehousemen's Union, Local 13 (Local 13), and International Longshoremen's and Warehousemen's Union, Local 63 (Local 63) filed a charge with Region 21 of the National Labor Relations Board (the Board) docketed as Case 21-CA-29995 against New Breed Leasing Corporation (Respondent or the Employer). On April 19, 1993, the ILWU and Locals 13 and 63 amended their charge. On April 7, 1994, the International Longshoremen's and Warehousemen's Union,

Local 63, Office Clerical Unit (Local 63 OCU and collectively with the ILWU, Local 13 and Local 63, the Unions or the Charging Parties) filed a charge with Region 21 docketed as Case 21-CA-30003 against Respondent. On September 29, 1994, the Unions filed a charge docketed as Case 21-CA-30299 against Respondent and amended the charge on December 14, 1994.

On May 27, 1994, the Regional Director for Region 21 issued an order consolidating cases, consolidated complaint, and notice of hearing consolidating Cases 21-CA-29995 and 21-CA-30003. Respondent filed an answer to the consolidated complaint dated June 10, 1994. The complaint and the answer were each further amended at the September 26, 1994 hearing. On September 26 through 29, 1994, hearings were held respecting Cases 21-CA-29995 and 21-CA-30003.

On November 25, 1994 the Regional Director for Region 21 issued a complaint respecting Case 21-CA-30299. The complaint alleges some of the same violations of the Act as the consolidated complaint respecting Cases 21-CA-29995 and 21-CA-30003[1] (the earlier complaint) with the additional allegations that Respondent

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[1] The complaint in Cases 21-CA-29995 and 21-CA-30003 alleged that Respondent is a successor employer with respect to two bargaining units represented by the Unions and that Respondent wrongfully failed and refused to hire the predecessor employer's unit employees in violation of Sec. 8(a)(3) and (1) of the National Labor Relations Act. The complaint further alleged that Respondent had a bargaining obligation with respect to employees in the two units and violated its duty to recognize and bargain with the Union in violation of Sec. 8(a)(5) and (1) of the Act in the following ways: (1) by failing to recognize and bargain with the Unions as

terminated three employees in late September and early October 1994 because of their union activities in violation of Section 8(a)(3) and (1) of the Act and changed work rules of unit employees without bargaining with the Unions in violation of Section 8(a)(5) and (1) of the Act.

On December 12, 1994, the General Counsel filed a motion to consolidate the complaint with the case then-pending decision in Cases 21-CA-29995 and 21-CA-30003. I granted the motion by Order dated January 3, 1995.

The reopened hearing on the consolidated complaints was held on January 30, 1995. At that hearing counsel for Charging Party Local OCU moved that the cases be severed to expedite the issuance of the decision in Cases 21-CA-29995 and 21-CA-30003. The General Counsel, with the concurrence of the other parties, took the position that, if the severance motion were granted, the existing record to that date respecting Cases 21-CA-29995 and 21-CA-30003 should be made a part of the litigation of the complaint in Case 21-CA-30299.

On February 14, 1995, I issued an Order Granting Motion Severing Case 21-CA-30299 and Decision in Cases 21-CA-29995 and 21-CA-30003 (JD(SF)-25-95), which severed Case 21-CA-30299 from Cases 21-CA-29995 and 21-CA-30003, decided the latter two cases, and further held that Case 21-CA-30299 would remain before me for decision following receipt of briefs based on a record

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representatives of its unit employees; (2) in initially establishing its unit employees' terms and conditions of employment without bargaining with the Unions; and (3) by failing to bargain with the Unions respecting changes from the predecessor's terms and conditions of employment.

including the record and decision in Cases 21-CA-29995 and 21-CA-30003.

On the entire record as described above, including the demeanor of the witnesses, and helpful briefs from the General Counsel and Respondent, I make the following[2]

Findings of Fact

I. JURISDICTION

At all times since April 1, 1994, Respondent, a New York corporation with an office and place of business in Compton, California, has been engaged in the operation of a container freight station providing warehousing and interstate and foreign shipment of cargo pursuant to a contract with the United States Army respecting its 1312 Medium Port Command (the army terminal). Based on a projection of its operations, Respondent's operation of the terminal will annually derive revenues in excess of $50,000 for the warehousing and transportation of freight in interstate and foreign commerce, under arrangements with various common carriers, each of which operates between California and various other states of the United

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[2] When not otherwise noted, the findings are based on the underlying record and decision in Cases 21-CA-29995 and 21-CA-30003 and the pleadings, stipulations of counsel, or unchallenged credible evidence in the instant case.

The findings and conclusions earlier made in my decision in Cases 21-CA-29995 and 21-CA-30003, to the extent they are a necessary part of my findings and conclusions, are set forth here only in summary form without an attempt to recapitulate the basis for those findings. The decision, and the record underlying it, as discussed above, is a part of the record in the instant case.

States or between California and foreign countries. Based on those projections, Respondent will annually perform services valued in excess of $50,000 for the United States Army, an enterprise directly engaged in interstate commerce. Based on its operations Respondent will function as an essential link in the transportation of freight in interstate and foreign commerce.

Based on the above I find that Respondent at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The Unions are and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Previous Findings*

In my decision in Cases 21-CA-29995 and 21-CA-30003, I found that Respondent had improperly failed to hire the employees of and was a successor to Maersk Pacific Limited respecting the operation of the contained freight station of the 1312 Medium Port Command of the United States Army. I held further that Respondent was obligated to hire the predecessor's employees and obligated to recognize and bargain with the Unions respecting the units described below:

The longshore and marine clerk unit represented by the Longshore Locals:

> All longshoremen and marine clerks employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

The office clerical unit or OCU represented by Local OCU:

> All office clerical employees employed by Respondent at 1312 Medium Post Command located at 1620 South Wilmington, Compton, California, excluding all other employees, professional employees, management employees, temporary management employees, trainees, confidential employees, salesmen, guards, watchmen, and supervisors as defined in the National Labor Relations Act.

I further found that the bargaining obligation arose before Respondent hired employees and, therefore, Respondent was obligated from the very beginning of its hiring to bargain with the Unions before changing any of the existing (i.e., Maersk), terms and conditions of employment.

Because Respondent had changed certain of the unit employees' terms and conditions of employment including work rules and procedures as well as jurisdictional delineations without bargaining with the Unions, I directed that Respondent restore the status quo ante respecting the bargaining units and thereafter change

those unit terms and conditions only after notification and bargaining with the Unions.

B. *Subsequent Events*

1. The Federal district court preliminary injunction

On August 22, 1994, Federal District Court Judge A. Wallace Tashima issued an order granting preliminary injunction[3] in an action brought by the Regional Director against Respondent pursuant to Section 10(j) of the Act in connection with the complaint in Cases 21-CA-29995 and 21-CA-30003. The order directed Respondent, pending final disposition of the unfair labor practice allegations, inter alia, to offer full and immediate reinstatement to the former employees of Maersk to their former positions displacing any persons hired as their replacements, to restore the wages, hours, and other terms and conditions of employment of the employees employed by Maersk in the appropriate units and to recognize and bargain with the Unions representing the two units.[4]

Representatives of the Unions and Respondent met respecting the court's order in September 1994. The

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[3] Docket 94-5196 AWT (Ctx).

[4] The Ninth Circuit Court of Appeals by memorandum dated January 6, 1995, modified the order of Judge Tashima by deleting the obligation that Respondent restore the former wages and conditions of employment of Maersk unit employees and modifying the obligation to hire all the former employees to allow a demonstration by Respondent that not all the former Maersk positions would have been available regardless of any unfair labor practices committed.

Unions sought reinstatement of all the Maersk employees to their former positions with the same terms and conditions of employment that had then obtained including the various contractual and other jurisdictional distinctions in job duties and responsibilities applicable to the three types of employee: longshoreman, marine clerks, and office clerical. Respondent took the position that employment would be offered only to those individuals who were needed under Respondent's consolidated operations and that past practices of Maersk including those respecting maintenance of traditional jurisdictional lines between the various types of employees would not be restored.

On September 21, and thereafter because of availability problems associated with the September trial proceedings in Cases 21-CA-29995 and 21-CA-30003, eight former Maersk employees were employed by Respondent. Not all former employees of Maersk who sought reinstatement were employed nor were all replacement employees displaced. The three individuals alleged in the instant complaint as discriminatees were part of this group. Despite the Union agents' protestations, Respondent did not restore the status quo ante with respect to these employee's working conditions including the jurisdictional distinctions between and among longshoremen, marine clerks, and office clerical employees either before or during the employment of the three.

2. The employment and discharge of Larry E. Taylor

Larry E. Taylor had worked at the army terminal for the various stevedoring contractors since about 1970 as a marine clerk. He testified his job was basically to supervise paperwork flow and the "warehouse situation" respecting loading and shipping of containers. Taylor testified that he went to work for Respondent on September 21, 1994, and was the only marine clerk at that time hired by Respondent from among the former Maersk employees.

Taylor was informed at the commencement of his employment by Respondent's project manager and highest onsite supervisor, James Moynihan, that although Taylor had done the work for many years one way, he was to learn to do it the way he was directed by Respondent's agents.

Taylor testified that Respondent did in fact do things differently than he had experienced with Maersk under the collective-bargaining agreement. More particularly, the duties of longshoremen and marine clerks were not separately maintained. Rather duties were organized in different ways with employees doing some tasks that were previously longshore unit work and other tasks that were previously marine clerk unit work.

Taylor testified to a variety of work situations in which, because of the different organization of work, he was called on to process papers respecting freight he had not directly tracked with the consequence that he was unable to correct errors that had occurred in freight disposition. James Moynihan testified that a series of freight

handling mistakes centered around Taylor in the days following his employment. Moynihan testified that he worked with Taylor to adjust procedures to insure such mistakes did not continue, but was unable to prevent their continuing occurrence. Moynihan testified that he came to the final conclusion that Taylor was simply sabotaging the job and, on October 3, 1994, terminated him.

3. The employment and discharge of Tommie Nunez

Tommie Nunez had worked at the army terminal for many years under Maersk and earlier contractors as a longshoreman. He testified his duties with Maersk were as a "dock utility" longshoreman stuffing and unstuffing containers, handling the privately owned vehicles (POVOs) being shipped, and running associated equipment to accomplish these tasks.

Nunez reported to work with Respondent on September 21, 1994. He testified that he was aware of the court's order and believed he was "supposed to go back to work the way it was." During the next few days he was assigned both traditional longshore work and other work, which under the collective-bargaining agreements would be marine clerks' work. He further testified that the working conditions and rules followed at Maersk were not followed under Respondent. Thus, for example, whereas at Maersk a pair of longshoremen might undertake to stuff a container, under Respondent he was assigned such duties alone.

On Tuesday, September 27, 1994, Nunez was loading and unloading back containers of POV's. In the afternoon

he had difficulty with a vehicle that had a dead battery with a broken battery post. Unable to start the vehicle, Nunez testified he requested help to remove the vehicle from the container. In time he was assigned someone to help him but, not recognizing the individual as a former Maersk longshoremen nor as an employee dispatched from the union hiring hall and, he testified, therefore not having confidence in the employee's ability to work safely with him. Nunez refused to work with the individual. Moynihan was summoned and the problem reviewed. Moynihan directed Nunez to work with the assigned employee. Nunez refused and was fired.

4. The employment and discharge of Fred Williamson

Fred Williamson had been a long time army terminal employee who worked for Maersk as a marine clerk with the further classification of chief truck delivery, receiving, and delivery clerk. Williamson reported for work at Respondent on September 26, 1994. Williamson testified that Moynihan directed him to an individual not known to him but identified by another witness as Bill Christe, a non-Maersk Respondent employee, for instruction. Williamson went to Christe and told him he would not take instruction from him because Christe was not his "boss." Christe reported to Moynihan who came over and asked Williamson if he was refusing to work. Williamson indicated he was not refusing to work, but that Christe was not his boss.

Following a brief assignment respecting the filing of keys, Williamson was told by Christe that he was to

receive trucks and that he would show Williamson how to do it. Williamson testified he replied, "You ain't going to show me nothing." Thereafter Christe went to Moynihan and, in essence the earlier colloquy with Moynihan was repeated with Williamson finally acceding to the assignment.

Williamson testified that he had been at his assigned task for under 2 hours when Moynihan asked him how long he was going to take to finish. Williamson demurred indicating he would be done as soon as he could. Williamson recalled the question and answer were repeated and thereafter Moynihan told him he was fired.

Moynihan testified that Williamson from the time he showed up on the job was uncooperative, insolent, and in essence trying to sabotage the job. Moynihan noted that Williamson had refused to cooperate with Christe, been away from his work assignment location, and been insolently slow in the completion of assigned tasks. Moynihan testified that he confronted Williamson when he was going very slowly through his task of checking out cars and asked when the job would be done. When Williamson repeatedly refused to suggest when he would complete his assigned tasks, Moynihan fired him. Moynihan made it clear that in his view Williamson was simply baiting him throughout the day.

C. *Analysis and Conclusions*

1. Duplicate allegations sustained in the complaint in Cases 21-CA-29995 and 21-CA-30003

The instant complaint duplicates allegations contained in the earlier complaint in Cases 21-CA-29995 and 21-CA-30003. To the extent that these allegations have been sustained in the earlier matter and no change in the conduct found violative was presented in the instant case, they will not be sustained a second time. There is no basis for finding a further violation of the Act, if the conduct in the instant case is in effect a continuation of conduct found violative in the earlier decision and is therefore fully remedied therein.

Thus, for example, the instant complaint alleges at paragraph 13(a) that Respondent at all times since April 1, 1994, implemented work rules and procedures and imposed terms and conditions of employment on the employees in the bargaining units, which were different from those that existed prior to April 1, 1994. Complaint paragraph 13(d) alleges these matters are mandatory subjects of bargaining and complaint paragraph 13(e) alleges that this was done without prior notice to the Unions and without affording the Unions an opportunity to bargain with Respondent respecting the conduct and its effect. Complaint paragraph 14 alleges this conduct to be violative of Section 8(a)(5) of the Act. All these allegations have been sustained in the prior proceeding and a remedy directed. The parties stipulated that Respondent has simply continued during the period relevant the same conduct found violative in the earlier case.

Respecting those "repeated" alleged violations, I here dismiss them as repetitive of the earlier allegations in the prior case and fully dealt with in the decision in Cases 21-CA-29995 and 21-CA-30003. The "new" allegations not here dismissed address the September and October 1994 terminations of three individuals: Larry Taylor, Tommy Nunez, and Fred Williamson.

2. New complaint allegations

a. *The complaint language*

Complaint subparagraphs 12(a), (b), and (c) allege that Respondent terminated Taylor, Nunez, and Williamson respectively. Complaint subparagraph 12(d) alleges the terminations were because the employees assisted the Unions and engaged in concerted activities, and to discourage employees from engaging in such activities. Paragraph 15 of the complaint alleges that the conduct set forth in paragraph 12 is discrimination in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

Subparagraphs 13(b), (c), and (e) of the complaint allege:

> (b) Since their reinstatements . . . until they were terminated . . . Williamson, Nunez and Taylor were assigned work duties outside their traditional unit jurisdiction, and were subjected to wages, hours and terms and conditions of employment different from those of Maersk.

(c) Respondent terminated Williamson, Nunez and Taylor for violation of work rules and procedures which were different from the work rules and procedures which had existed prior to April 1, 1994.

. . . .

(e) Respondent engaged in the conduct described above in paragraphs 12(a) through 12(c) and 13(a) through 13(c), without prior notice to the Unions and without affording the Unions an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

Paragraph 14 of the complaint alleges, inter alia, that Respondent's actions alleged in paragraphs 12(a) through (c) and 13(b) through (c) and 13(e) are violations of Section 8(a)(1) and (5) of the Act. Paragraph 16 of the complaint alleges the same conduct as violative of Section 8(a)(1) of the Act.

b. *The arguments of the parties*

The General Counsel argues on brief that Williamson, Nunez, and Taylor were confronted with a "New Breed way" that was far different from what they had experienced under Maersk's pre-April 1, 1994 working conditions, was far different from the working conditions that Respondent was obligated to apply to them as found in the decision in Cases 21-CA-29995 and 21-CA-30003 and was far different from what their Union and they had

expected when they commenced employment. The General Counsel argues that this failure to restore the status quo ante was the cause of the discharge of each employee. Citing cases for the proposition that employees who lose their jobs pursuant to illegally instituted working conditions are improperly discharged, the General Counsel argues in effect that Respondent could not discharge the three employees for violating unilaterally adopted work and jurisdiction rules or for refusing to abide by such illegal rules. The General Counsel further argues that the three employees are also entitled to an offer of reinstatement and backpay under the decision in Cases 21-CA-29995 and 21-CA-30003.

Respondent on brief argues that the three were terminated for poor performance and insubordination free from any impermissible motives and therefore Respondent did not violate the Act in any way. Further, Respondent argues that if any of the three were unhappy with their working circumstances they "could have worked under protest and subsequently grieved Moynihan's instructions," Respondent's brief at footnote 3, page 8.

c. *Analysis and conclusions respecting the discharges*

(1) An initial caveat

In my view the instant case has been somewhat confused as a result of its consolidation with and subsequent severance from Cases 21-CA-29995 and 21-CA-30003 after those cases had been tried, but before a decision respecting them had issued. At the outset of the analysis it is important to note what is and is not at issue in the instant

case as opposed to the earlier case. First, as noted above, although the instant case is not a simple repetition of the complaint allegations in Cases 21-CA-29995 and 21-CA-30003, to the extent it does repeat allegations earlier litigated and decided, those repeated allegations are not considered anew, but have been dismissed, above. Second, the instant case is not the compliance stage of the earlier case. That is, a subsequent unfair labor practice complaint and hearing is not the normal means or forum for deciding whether discriminatees are entitled to offers of reinstatement under a remedy directed in an earlier case. More specifically, addressing the three individuals at issue, who were ordered hired by Respondent in Cases 21-CA-29995 and 21-CA-30003, such issues are normally litigated, if then ripe, when Cases 21-CA-29995 and 21-CA-30003 are in the compliance stage.

(2) The alternative discharge theories of the General Counsel

(a) *The antiunion animus motive theory*

The General Counsel has, in essence, two theories of discharge that must be separately considered. The first, alleged in complaint subparagraph 12(d), is that the three individuals were discharged by Respondent out of an antiunion, antiprotected activity, or retaliatory motive. This is a traditional factual issue.

The General Counsel relies on the animus implicit in the violations earlier found, in Respondent's refusal either to hire all the Maersk employees or to restore the status quo ante particularly respecting preservation of the

work or jurisdictional distinctions clearly of concern to the Unions and the individuals at issue and in Respondent's agents' reactions to the actions of the three individuals.

Respondent's agent Moynihan denied his actions in terminating any of the three were so motivated. I discredited Moynihan in the earlier case. I credit him here based on his demeanor as well as a consideration of the probabilities and the record as a whole including the earlier record as noted above. I believe that he did not fire Williamson, Nunez, or Taylor for such reasons. From Moynihan's point of view, based on his credited testimony, the conduct of the three was inadequate and merited discharge. There is no evidence that higher-ups within Respondent's organization caused these discharges for antiunion reasons. Accordingly, I find the General Counsel's traditional animus theory of illegal discharge is not sustained by the facts.

(b) *The discharges as a consequence of illegal working conditions theory*

The General Counsel's latter theory, as explicated on brief and described briefly above, is grounded in the line of Board cases that hold that if an employee is discharged from failing to conform to rules or working conditions, which are themselves illegally imposed, the discharge is also improper.

The General Counsel's theory as applied to the instant case is that Respondent was obligated to restore Williamson, Nunez, and Taylor to the working conditions they enjoyed under Maersk and, when Respondent

admittedly failed to do so, it could not properly fire them for their failure to comply with the illegal working conditions that were in fact applied to them. As a matter of law, argues the General Counsel, Respondent violated the Act in terminating them for their refusals to acquiesce in the illegal working conditions.

The error in the General Counsel's approach to the terminations under this theory, in my view, is that it presupposes that for the purposes of deciding this case, Respondent was obligated to restore the working conditions of the three former Maersk unit employees at issue. That is, of course, true under my decision in Cases 21-CA-29995 and 21-CA-30003 and would be true, if the instant case were in the compliance stage of that earlier case considering if the three were reinstated consistent with the Order in that case.

As noted several times, above, however, Cases 21-CA-29995 and 21-CA-30003 are independent of the instant case and I shall not herein direct or find what has been found previously. I have ruled that the aspects of the instant complaint that repeat allegations in Cases 21-CA-29995 and 21-CA-30003 or that would be properly part of the compliance stage of that case will not be found violative herein. And, to the extent such theories are raised anew herein, they will be dismissed.

Given that holding, the General Counsel's argued obligation of Respondent to restore the status quo ante with respect to Williamson, Nunez, and Taylor may not rely on the obligations declared in Cases 21-CA-29995 and 21-CA-30003 – those obligations will be determined and applied in that case independent of the instant case.

Nor may the General Counsel rely on the Federal court's order, quoted above, to impose such an obligation even though the record suggests that order was the basis for the reinstatement of the three employees at issue herein and others. That is so because the Federal district court's order does not create rights or obligations enforced by administrative law judges under the Act.

Lacking these two bases for arguing in the instant case that Respondent was obligated to restore the status quo ante to Williamson, Nunez, and Taylor, and no other basis being arguable on this record, the General Counsel's theory that Respondent's terminations were illegal as part of an illegal application of working conditions – insofar as the matter is independent of the violations found in Cases 21-CA-29995 and 21-CA-30003 must fail. I shall therefore dismiss the discharge allegations respecting Williamson, Taylor, and Nunez.

In essence what I have determined in dismissing the complaint in its entirety is that the matters in issue are fully and properly covered in the independent proceeding in Cases 21-CA-29995 and 21-CA-30003. Respondent has been found to have illegally failed to hire the three individuals in contest in April 1994 in Cases 21-CA-29995 and 21-CA-30003, and has also been found to have failed to recognize and bargain with the Unions and to have failed to restore the status quo ante respecting those employees. The record suggests that Respondent has simply continued to refuse to change those working conditions.

Given all the above, it is not necessary to find that Respondent's continuing failures under Section 8(a)(5) of

the Act are new violations. There is nothing that could be directed herein that has not been directed in the Order in Cases 21-CA-29995 and 21-CA-30003. Respecting the hire and virtually immediate discharge of the three former Maersk employees at issue, the Order in Cases 21-CA-29995 and 21-CA-30003 directs they be employed under status quo ante conditions. My findings indicate I believe the question of whether Respondent properly met the terms of the earlier Order or whether the conduct of these individuals precludes the necessity of Respondent now offering them employment should be litigated as part of the compliance stage of Cases 21-CA-29995 and 21-CA-30003 and not as a separate, free standing unfair labor practice complaint. If Respondent's conduct was improper, I believe the consequences will be properly adjusted in that compliance stage and not in a new unfair labor practice finding and remedial Order. More simply put, I have dismissed the complaint in this case because I believe it adds nothing to what has been found or may be resolved in the compliance stage of Cases 21-CA-29995 and 21-CA-30003.

It may be that I have discretion to, in effect, repeat findings made in Cases 21-CA-29995 and 21-CA-30003 and sustain the General Counsel's complaint in the instant case. If that is so, I specifically exercise my discretion not to do so, but rather reaffirm the result reached above. This is so because it seems to me to be bad policy to put into a second, independent unfair labor practice decision findings, conclusions, and an order that contribute nothing to remedying the situation litigated in the

earlier case or within the scope of the earlier cases' compliance procedures, but which decision is totally dependent on that earlier case for its validity. If all the unfair labor practices and compliance matters respecting the three individuals and Respondent's obligations under Section 8(a)(5) of the Act are dealt with exclusively in Cases 21-CA-29995 and 21-CA-30003, any modification in the holding by reviewing authority resolves the entire matter. If the matters are needlessly split between two independent cases, the consequences of any modification by reviewing authority of the Cases 21-CA-29995 and 21-CA-30003 will not be immediately addressed by that authority and additional actions will have to be taken by the parties or reviewing authority to bring the two cases into harmony. Far better in my judgment, when no substantive harm or procedural impediment exists, to keep the entire controversy in one proceeding. Given this view, even were it possible to, in effect, split the remedial Order directed to Respondent into two proceedings, I would decline to do so.

3. Summary of findings respecting complaint allegations

I have found that the instant complaint, to the extent it simply recapitulates allegations previously sustained in the decision in Cases 21-CA-29995 and 21-CA-30003, is redundant and unnecessary. Those duplicative allegations have been dismissed on that ground. Similarly, I have found that the allegations of violations of Section 8(a)(5) and (1) of the Act respecting the events occurring after April 1, 1994 – including the circumstances of the hiring of the three individuals in questions herein – are

sufficiently covered by the Decision and Order in Cases 21-CA-29995 and 21-CA-30003 and are properly dismissed.

Respecting the discharge allegations contending violations of Section 8(a)(3), (5), and (1) of the Act, I have found that Respondent did not discharge the three individuals out of antiunion or antiprotected activity animus. I have also found that the General Counsel's theory of a violation in the instant case, unlike the compliance stage of the decision in Cases 21-CA-29995 and 21-CA-30003, may not assume, predicated on the findings in that case, that Respondent was obligated to establish the status quo ante respecting unit working conditions and that, having failed to do so, could not discharge employees for refusing to comply with the new working conditions. Having made this finding, I further found that there is no evidence that Respondent terminated the three in violation of the Act. I therefore dismissed the discharge allegations of the complaint.

IV. FURTHER FINDINGS RESPECTING THE DISCHARGES

The procedural development of this case in respect to the initial litigation of Cases 21-CA-29995 and 21-CA-30003, the subsequent consolidation of the instant case, the issuance of a decision in Cases 21-CA-29995 and 21-CA-30003 and, finally, a decision in the instant case is unusual. The case is also unusual because of the existence of a judicial order, the parties dealing with that order and the reinstatements that were generated by it.

I have ruled that the instant case must be treated as separate and apart from the decision in Cases 21-

CA-29995 and 21-CA-30003 and that the violations found therein will not be simply repeated. I extended that distinction to matters that are in my view a proper part of the compliance stage of Cases 21-CA-29995 and 21-CA-30003. Thus, I have dealt with the discharges of Williamson, Nunez, and Taylor only as a [sic] separate, independent, free standing violations of the Act and not as reinstatement issues as would be handled in the compliance stage of Cases 21-CA-29995 and 21-CA-30003. In that context I have found no violations of the Act in Respondent's termination of the three.

Although I hope I have made clear the distinctions described above, in order to avoid misunderstandings of the parties respecting how the events should be viewed in the compliance stage of Cases 21-CA-29995 and 21-CA-30003, I make the following further conditional findings in that compliance context and not as part of my analysis of the unfair labor practice complaint allegations, above.[5]

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[5] In an earlier case, I deferred reinstatement issues arising in the context of employer actions taken pursuant to a Federal district court order in an action brought under Sec. 10(j) of the Act to the compliance stage of the proceeding. The Board did not defer the issue, but rather decided the question as part of its decision on exceptions to my decision. *Honda of Hayward*, 307 NLRB 340 (1992). It is possible that the Board may wish to reconsolidate the instant case with that in Cases 21-CA-29995 and 21-CA-30003 and address the compliance issues discussed above. In that event these conditional findings may alleviate any need for a remand for further findings of fact.

A. *First conditional compliance finding in Cases 21-CA-29995 and 21-CA-30003*

As a compliance matter in Cases 21-CA-29995 and 21-CA-30003 Respondent was obligated to offer Maersk unit employees reinstatement to positions to which Maersk terms and conditions of employment were applied. These conditions include the existing jurisdictional and other work rules. Respondent admittedly did not do so regarding Nunez, Williamson, and Taylor and no suggestion was made or could be supported on this record that the Union or the employees waived their rights to obtain the benefits of that Order's provision. Accordingly, I find that Respondent did not offer reinstatement as required by the Order in Cases 21-CA-29995 and 21-CA-30003 to Williamson, Nunez, and Taylor in September and October 1994.

B. *Second conditional compliance finding in Cases 21-CA-29995 and 21-CA-30003*

Further, I find as a compliance matter in Cases 21-CA-29995 and 21-CA-30003 that in as much as the Union, Williamson, Taylor, and Nunez all believed that, consistent with the court's order, Respondent was in fact going to apply the status quo ante to the positions accepted by Williamson, Taylor, and Nunez, that a fundamental mutual mistake occurred in the abortive employment relationships created when Respondent hired Williamson, Nunez, and Taylor in September and October 1994 but did not in fact restore the status quo ante as they expected. I find that those employment relationships, in essence, ended as a result of that misunderstanding

between the parties and may be regarded for purposes of evaluating Respondent's subsequent obligations to Williamson, Nunez, and Taylor, as voluntary quits by the three. In effect I find that their conduct in refusing to conform to Respondent's new working conditions – which prompted their discharge – as justified and should not be used against them to deny them the continuing right to be offered employment as directed by the decision in Cases 21-CA-29995 and 21-CA-30003.

C. *Summary of additional findings*

Having dismissed the complaint in its entirety in part because portions were already established in the decision in Cases 21-CA-29995 and 21-CA-30003 or properly part of the compliance stage of that preceding, I made certain further findings respecting that compliance stage so as to avoid the possibility that the unfair labor practice findings in the instant case would be misinterpreted or misapplied in the compliance stage of Cases 21-CA-29995 and 21-CA-30003 or that the Board would consolidate the instant case with Cases 21-CA-29995 and 21-CA-30003 and, desiring to address the compliance issue at that stage, remand the cases for further findings.

Addressing the implications of the discharges of Williamson, Taylor, and Nunez in the instant case on their rights to reinstatement and backpay in the compliance stage of Cases 21-CA-29995 and 21-CA-30003, I, in effect, declared "no harm, no foul." Thus, I found the hire and discharge of Williamson, Nunez, and Taylor in September 1994 was the result of a mutual mistake respecting the terms and conditions of employment that would apply to

the three such that their discharges should be held equivalent to justifiable quits that would not detract from or constitute a waiver of their rights to any and all relief they would otherwise be entitled to under the decision in Cases 21-CA-29995 and 21-CA-30003.

On the basis of the above findings of fact and on the entire record, I make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint shall be and it hereby is dismissed.

Dated at San Francisco, California, March 21, 1995.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA E. AGUAYO, Regional Director, Petitioner-Appellee, v. **NEW BREED LEASING CORPORATION,** Defendant-Appellant.	No. 94-56215 D.C. No. CV-94-05196-AWT **MEMORANDUM*** (Filed Jan. 6, 1995)

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted December 5, 1994**
Pasadena, California

Before: **FARRIS, POOLE** and **KOZINSKI,** Circuit Judges.

A. The district court did not abuse its discretion in granting an interim injunction against New Breed pursuant to section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j). New Breed was not obligated to hire

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Maersk's employees, but if it refused to hire them because of their union affiliation, or as a device to avoid any duty to recognize and bargain with their union, it violated sections 8(a)(3) and (1) of the NLRA, 29 U.S.C. § 158(a)(3) & (1). *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 n.8 (1974); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1100 (9th Cir. 1981). It is undisputed that New Breed solicited applications through a blind ad in a local newspaper and conducted its interviews off-site. While this may be New Breed's ordinary operating procedure, the surreptitious nature of the application process is one factor the Board may consider in determining whether New Breed deliberately sought to avoid hiring Maersk employees because of their union affiliation. *See Kallmann*, 640 F.2d at 1099. This evidence, along with the testimony of former Maersk employees, is sufficient, if believed, to provide a more than ample basis for concluding that New Breed acted with anti-union animus in avoiding applications from former Maersk employees. There is thus a substantial likelihood that the unfair labor practices charge will succeed, and in these circumstances, irreparable injury is presumed. *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994).

B. The district court did err, however, in requiring New Breed to restore the former wages and conditions of employment at the Compton site. Requiring New Breed to set initial wages at the union rate is not necessary to "protect the integrity of the collective bargaining process [or] to preserve the Board's remedial power." *Miller*, 19 F.3d at 459-60. The district court has ordered New Breed to reinstate former Maersk employees and to bargain with their unions, and in the event the Board finds that

New Breed committed an unfair labor practice by setting initial wages below the union rate, it can fashion a back pay award to remedy that harm. *Kallmann*, 640 F.2d at 1103.

C. The district court also exceeded its authority by requiring New Breed to reinstate all Maersk's former employees without first providing New Breed an "opportunity to show that fewer than [eleven] jobs would have been available." *Id.* at 1102. The Board may not be able to reinstate all employees, as it "has a duty to consider how many employees, if any, the company would have continued to employ but for the unfair labor practices," *N.L.R.B.* v. *Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), and the Board has presented no compelling argument why the district court should preserve relief that the Board itself could not award.

We therefore **AFFIRM** the Section 10(j) injunction and **REMAND** for the district court to reconsider the appropriate scope of that injunction. On remand, the district court shall provide New Breed an opportunity to establish that fewer than eleven jobs would have been available for former Maersk employees regardless of New Breed's alleged unfair labor practice and modify the injunction to permit New Breed to set initial wages and conditions of employment.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTORIA E. AGUAYO, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. NEW BREED LEASING CORPORATION, Respondent and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, AND ITS LOCALS 13, 63 AND OFFICE CLERICAL UNIT Intervenors	Case No. 94-5196 AWT (CTx) ORDER GRANTING PRELIMINARY INJUNCTION Date: Aug. 22, 1994 Time: 1:30 p.m. (Filed Aug. 22, 1994)

This case came to be heard upon the verified petition of Victoria E. Aguayo, Regional Director for Region 21 of

the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. § 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board. The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in this case, has made and filed its findings of fact and conclusions of law finding and concluding that there is reasonable cause to believe that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1), (3), and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is ORDERED, ADJUDGED AND DECREED, that, pending the final disposition of the matters involved pending upon the Board:

1. New Breed Leasing Corporation, herein called respondent, its officers, representatives, agents, servants, employees, attorneys and all persons acting in concert with it are, enjoined and restrained from:

(a) informing employees and International Longshoremen's and Warehousemen's Union and its Locals 13, 62 [sic] and office clerical unit, collectively called the Unions, that it would be futile for the unions [sic] to request recognition as the exclusive collective-bargaining representative of employees in the appropriate units;

(b) failing and refusing to recognize and bargain as a successor employer with International Longshoremen's and Warehousemen's Locals 13 and 62 [sic] as the exclusive collective bargaining representative of all longshoremen and marine clerks employed by respondent at its facility located at 1620 South Wilmington, Compton, California;

(c) failing and refusing to recognize and bargain as a successor employer with International Longshoremen's and Warehousemen's Union and its local office clerical unit as the exclusive collective bargaining representative of all office clerical employees employed by respondent at 1312 Medium Post Command, 1620 South Wilmington, Compton, California, hereafter called the Compton facility;

(d) failing to continue the wages, hours and other terms and conditions of employment of the employees formerly employed by Maersk Pacific Limited, herein called Maersk, at the compton [sic] facility in the appropriate units set forth above, without prior notice to the Unions and without affording the unions [sic] an opportunity to bargain with respondent with respect to this conduct and the effect of this conduct on unit employees;

(e) failing or refusing to hire the former Maersk employees employed in the appropriate units at the Compton facility because they supported the Unions, to discourage employees from supporting the Unions or engaging in concerted activities and to avoid having to recognize and bargain as a successor employer with the Unions as the collective-bargaining representatives of its [sic] employees in the appropriate units.

(f) in any other manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed from [sic] under Section 7 of the Act. [29 U.S.C. Sec. 157].

2. Respondent, its officers, representatives, agents, servants, employees, attorneys and all persons acting in concert with it are affirmatively ordered to:

(a) offer full and immediate reinstatement to the former employees of Maersk employed at the facility in the units represented by the unions [sic] on March 31, 1994, to their former positions without prejudice to their seniority or other rights and privileges, displacing any persons hired by Respondent as their replacements, or if any of those positions no longer exist, to substantially equivalent positions;

(b) restore the wages, hours, and other terms and conditions of employment of the employees employed by Maersk before April 1, 1994, in the appropriate units represented by the unions [sic].

(c) recognize and bargain with the unions [sic] as the exclusive collective-bargaining representatives of its employees in the appropriate units set forth herein above;

(d) post copies of the Court's order at respondent's Compton, California facility at all locations where respondent notices to employees are customarily posted; said postings shall be maintained during the Board's administrative proceeding free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to respondent's Compton, California

facility to monitor compliance with this posting requirement; and

(e) within twenty (20) days of the issuance of this Order, file with this Court, with a copy submitted to the Regional Director of the Board for Region Twenty-One, a sworn affidavit from a responsible official of Respondent setting forth with specificity the manner in which Respondent has complied with the terms of this decree, including how the Respondent has posted the documents required by this Order.

3. That this case shall remain on the docket of this Court and on compliance by respondent with its obligations undertaken hereto, and upon disposition of the matters pending before the Board, the petitioner shall cause this proceeding to be dismissed.

Done, at Los Angeles, California, this 22d day of August, 1994.

A. WALLACE TASHIMA
United States District Judge

Presented by:

/s/ Frank M. Wagner
Frank M. Wagner
Attorney for Petitioner

FILED
SEP 26 1997

No. 97-185

In the Supreme Court of the United States

OCTOBER TERM, 1996

NEW BREED LEASING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether the National Labor Relations Board may remedy a successor employer's unlawful refusal to hire its predecessor's employees and to bargain with their unions by ordering the employer to reinstate those employees, to engage in bargaining with the unions, and to adhere to the previous terms and conditions of employment during the bargaining process.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 111 F.3d 1460. The decisions and orders of the National Labor Relations Board (Pet. App. 28-36) and the administrative law judge (Pet. App. 36-101, 102-128) are reported at 317 N.L.R.B. 1011.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1997. The petition for a writ of certiorari was filed on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner received a subcontract to operate a United States Army freight station and vehicle processing facility in Compton, California. A series of other private employers had previously operated the facility and had recognized locals of the International Longshoremen's and Warehouseman's Union (the unions) as the collective-bargaining representatives of their employees. Petitioner's immediate predecessor, Maersk Pacific Limited, had employed 12 persons at the facility. Maersk was a member of the Pacific Maritime Association (PMA), a multi-employer organization that represents its members in negotiating and administering collective bargaining agreements with the unions. The unions represented the 12 employees, who worked under union contracts. Pet. App. 2, 41-44.

Before submitting its bid for the subcontract, petitioner had contacted the PMA and had secured membership applications and other materials, including copies of PMA's current collective-bargaining agreements. Pet. App. 46. In its bid, petitioner stated that "[c]onversations have been initiated and provision made to work with" PMA in obtaining "both long-term and occasional workers" and that "[m]embership in PMA assures the experience level of the work force and simplifies personnel administration." *Id.* at 45. Thereafter, petitioner submitted a membership application to PMA, together with a $1,000 application fee. *Id.* at 3, 46.

After receiving notice that its bid for the subcontract was successful, petitioner gave repeated assurances to union representatives and individual employees that the current work force at the facility would

be retained. Pet. App. 47, 49-53, 56-57, 68-70. Nonetheless, petitioner began to run anonymous employment advertisements in the local newspaper, soliciting outside job applicants. Petitioner screened the outside applications it received and interviewed applicants at a local hotel. Petitioner did not notify the unions and the current employees of those employment solicitations. *Id.* at 4, 51-52, 55, 77-80.

After conducting the outside interviews, petitioner notified the Army and the unions that it did not intend to retain the current employees. At about the same time, petitioner determined not to complete its membership agreement with PMA and hired its work force from the outside applicants. Pet. App. 55-56, 58-59. When petitioner began operation of the facility, it unilaterally established the employees' terms and conditions of employment and refused to recognize or bargain with the unions. *Id.* at 59-60.

2. The unions filed unfair labor practice charges against petitioner. Pet. App. 37. The Regional Director of the National Labor Relations Board, on behalf of the Board's General Counsel, issued administrative complaints on the charges, alleging that petitioner had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), by discriminating in hiring against the predecessor's employees, refusing to recognize and bargain with the unions, and unilaterally setting the employees' terms and conditions of employment. Pet. App. 37-38.

3. While the administrative complaints were pending, the Regional Director petitioned the United States District Court for the Central District of California for temporary injunctive relief under Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j). The district court granted the Regional Director's

request for an order requiring petitioner to offer full reinstatement to the predecessor's employees, restore the preexisting terms and conditions of employment, and recognize and bargain with the unions. Pet. App. 132-136. The court of appeals concluded that an injunction was appropriate, but it found no need to order an interim restoration of preexisting terms and conditions of employment, noting that if the Board ultimately found that petitioner had committed the unfair labor practices alleged, the Board could "fashion a back pay award to remedy that harm." *Id.* at 130-131.

4. Following a hearing on the merits of the Regional Director's administrative complaints, an administrative law judge (ALJ) found that petitioner had excluded the predecessor's employees from hiring to avoid a bargaining obligation with the unions, thereby violating Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3). Pet. App. 75-84. The ALJ additionally found that petitioner would have hired the predecessor's employees but for its desire to avoid bargaining with the unions and that petitioner's refusal to recognize and bargain with the unions and its unilateral changes in terms and conditions of employment therefore violated Section 8(a)(1) and (5), 29 U.S.C. 158(a)(1) and (5). Pet. App. 87-88.

5. The National Labor Relations Board affirmed the ALJ's findings and conclusions. Pet. App. 28-36. Because the evidence showed that petitioner refused to hire the predecessor's employees based on its desire to avoid bargaining obligations, the Board agreed with the ALJ that petitioner "was not free to change the prevailing terms and conditions of employment unilaterally." *Id.* at 29 n.3. The Board

essentially adopted the ALJ's recommended order, *id.* at 29-31, which directs petitioner to offer reinstatement to the predecessor's employees; to give them back pay and other make-whole relief; to bargain with the unions; and to restore the previous terms and conditions of employment until petitioner "negotiates in good faith with the Unions to agreement or to impasse," *id.* at 94-96.[1]

6. The court of appeals affirmed the Board's unfair labor practice findings and enforced the Board's order. Pet. App. 1-27. The court specifically approved the provisions of that order directing petitioner to restore the preexisting terms and conditions of employment and to make the employees whole for petitioner's unilateral changes. *Id.* at 13-18, 96. It rejected petitioner's threshold contention that the court's disapproval of some of the terms of the temporary restoration order in the Section 10(j) injunction established "law of the case" that precluded the Board from employing those terms in its final restoration order. *Id.* at 13-15.

The court agreed with the Board's rationale that the parties must be restored to the status quo ante as a predicate for bargaining. The employees were therefore entitled to reinstatement under appropriate terms and conditions of employment. Because petitioner had wrongfully refused to hire the employees or bargain with their unions, petitioner bore the burden of proving that, had it done so, it "would not have agreed to the wage scale provided by the

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[1] The Board reserved to future compliance proceedings the issue of how many employees would be entitled to reinstatement and back pay. It modified the ALJ's recommended order to make clear that limitation. Pet. App. 29 & n.4.

predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages." Pet. App. 15-18. The court concluded that, because petitioner had failed to satisfy that burden, "the Board's grant of back pay based on the predecessor's [u]nion pay scale restores as nearly as possible the employment situation that would have occurred absent [petitioner's] discrimination against the Union employees." *Id.* at 18.

Judge O'Scannlain agreed that petitioner had committed unfair labor practices, but dissented from the court's enforcement of the Board's remedy. Pet. App. 19-27. In his view, the law of the case doctrine prevented the Board from employing a remedy in its final restoration order that the court of appeals had not allowed in the Section 10(j) proceeding for a temporary injunction. *Id.* at 19-20. Judge O'Scannlain also concluded that the Board's remedy was inconsistent with a successor employer's normal privilege to set initial terms and conditions of employment. *Id.* at 22-25.

ARGUMENT

The court of appeals properly affirmed the Board's exercise of remedial discretion in this case. Contrary to petitioner's contentions, the court's decision does not conflict with any decision of this Court or another court of appeals. The decision, which affirms a Board remedy based on the particular facts of the unfair labor practices at issue here, does not present any issue of general importance warranting this Court's review.

1. Petitioner contends (Pet. 13-17) that the court of appeals' decision directing petitioner to restore its predecessor's terms and conditions of employment

pending bargaining is "[i]rreconcilable" with this Court's decisions in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). That contention is incorrect. This Court ruled in *H.K. Porter* that the Board may not compel an employer to adopt terms of a collective bargaining agreement that the employer has rejected in the collective bargaining process. 397 U.S. at 107-109. Applying that principle, the Court ruled in *Burns* that, while a successor employer may be under an obligation to bargain collectively with the union representing its predecessor's employees, the Board may not compel the successor to adopt a predecessor's collective-bargaining agreement. 406 U.S. at 281-291. See also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987).[2]

Those well established principles are not at issue here. In this case, petitioner pursued a discriminatory hiring scheme specifically to avoid creating any bargaining obligations that would result from hiring its predecessor's employees. By doing so, it committed unfair labor practices in violation of the

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[2] The Court ruled in *Burns* that a successor is ordinarily free to establish its initial terms and conditions of employment, without bargaining with the union, because the union's majority will not be established until the successor hires a majority of its work force from the predecessor's employees. 406 U.S. at 292-296. The Court indicated, however, that an exception may exist when "it is perfectly clear that the new employer plans to retain all of the employees in the unit"; in that setting, it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-295. See *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 47 n.14.

National Labor Relations Act. Pet. 3, 15, 17. As part of the remedy for those violations, the Board ordered petitioner to bargain in good faith with the employees' representatives until an agreement or an impasse in bargaining is reached. The Board additionally ordered that petitioner, on request of the employees, must restore the predecessor's terms and conditions of employment *during that bargaining process*. See Pet. App. 96.

Contrary to petitioner's argument, the Board's order does not impose a collective-bargaining agreement on petitioner in violation of *H.K. Porter* and *Burns*. The restoration provision is a "temporally limited" requirement to restore the status quo that existed before petitioner committed the unfair labor practice. *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2d Cir. 1996). It reinstates the predecessor's terms and conditions of employment only as a predicate for bargaining. Petitioner is free, through fulfillment of its bargaining obligation, to reach a different agreement with the employees or to reach a good faith impasse. In either event, petitioner would not be bound to maintain the predecessor's terms. See Pet. App. 96.

The Board's order also does not infringe on a successor employer's normal right to set initial employment terms in the course of nondiscriminatory hiring. See *Burns*, 406 U.S. at 292-296. The Board took remedial action in response to petitioner's violation of its bargaining obligations, and it fashioned a remedy that sought to restore the collective bargaining environment that would have prevailed if petitioner had not violated the law. In formulating that remedy, the Board had to determine the situation that would have existed in the absence of petitioner's

unlawful conduct. The Board properly concluded that petitioner, as the wrongdoer, bore the burden of any uncertainty over the bargaining environment that would have existed if it had not engaged in illegal acts. See, *e.g.*, *Staten Island Hotel Ltd. Partnership*, 101 F.3d at 862.

As the court of appeals explained, the record in this case was "devoid of any evidence that the employees' wages would have changed had [petitioner] initially recognized and bargained with the Unions." Pet. App. 18. The Board therefore selected the predecessor's terms and conditions of employment as the best estimation of the status quo ante. The Board did not impose a "punitive" remedy (Pet. 17). It simply sought to restore the situation, to the extent possible, to the one that would have prevailed but for the violations. See *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In doing so, the Board appropriately exercised its remedial discretion. See generally *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943) (Board's order must stand unless it represents "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

2. Petitioner contends (Pet. 18-21) that the court of appeals' decision in this case conflicts with decisions of other courts of appeals. That contention is incorrect. The courts of appeals have uniformly upheld the Board's imposition of similar restoration remedies in cases in which a successor has discriminated in hiring, based on anti-union animus, to avoid a bargaining obligation.

Seven courts of appeals have ruled that, when an employer has engaged in hiring discrimination to avoid a successorship obligation, the Board may appropriately remedy that violation by requiring the successor to reinstate the predecessor's terms and conditions of employment until the successor bargains in good faith with the union to agreement or impasse. See *NLRB* v. *Horizons Hotel Corp.*, 49 F.3d 795, 806 (1st Cir. 1995); *NLRB* v. *Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 861-862 (2d Cir. 1996); *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-307 (3d Cir. 1990); *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 624-625 (6th Cir. 1987); *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1319-1324 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992); *Pace Industries, Inc.* v. *NLRB*, 118 F.3d 585, 593-594 (8th Cir. 1997); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1102-1103 (9th Cir. 1981).[3]

Petitioner's assertion of a conflict rests, in primary part, on decisions that deal with a different issue arising from a qualification that this Court

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[3] In *Kallmann*, the court agreed with the Board that "the employer should not be permitted to benefit from his illegal conduct" and therefore could be required retroactively to apply the predecessor's terms. 640 F. 2d at 1103. The court, however, concluded that the backpay period should be limited, in light of evidence that the employer "would not have agreed to union demands to pay the higher rate." *Ibid.* As explained above, the court of appeals found no such evidence here. The Sixth Circuit's decision in *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (1987), cert. denied, 486 U.S. 1042 (1988), which petitioner cites (Pet. 21), is similarly distinguishable. In that case, the court remanded a backpay order for further consideration because of the court's concern that, as in *Kallmann*, the facts indicated the successor would never have agreed to the predecessor's terms.

attached to its successor employer ruling in *Burns*. The Court stated in *Burns* that when "it is perfectly clear that the new employer plans to retain all of the employees in the unit," it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295. See note 2, *supra*. Petitioner mistakenly suggests that decisions dealing with that particular circumstance conflict with the situation presented here, in which petitioner committed unfair labor practices precisely to avoid hiring its predecessor's employees.

For example, petitioner argues (Pet. 18-19) that the court of appeals' decision here conflicts with *NLRB* v. *Spruce Up Corp.*, 529 F. 2d 516 (4th Cir. 1975), enforcing mem. 209 N.L.R.B. 194, 195 (1974), and *International Association of Machinists* v. *NLRB*, 595 F.2d 664, 671-676 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979). In each of those cases, the courts of appeals upheld the Board's conclusion that successor employers who expressed a willingness to hire the predecessors' employees, but stated from the outset that the terms of employment would be different, were not required to bargain over the initial employment terms.[4] Those cases do not involve review of the

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[4] Contrary to petitioner's suggestion (Pet. 19 n.9), the Board's decision here does not rest on *Spruce Up*. Rather, the ALJ merely noted as background, in his discussion of the timing of a successor employer's bargaining obligation, that the "Board discusses these timing issues and their consequences in *Spruce Up Corp.*" Pet. App. 87. Accordingly, the divergent opinions of the Board members on *Spruce Up*, to which petitioner refers (Pet. 19 n.9), citing *Canteen Corp.* v. *NLRB*, 103 F.3d 1355, 1359-1360, 1362 (7th Cir. 1997), are irrelevant here.

Board's discretion to impose a remedy in response to a successor employer's use of unfair labor practices to avoid a bargaining obligation. They therefore are not in conflict with the court of appeals' decision here.[5]

Petitioner also contends (Pet. 19-21) that the court of appeals' decision conflicts with *Systems Management, Inc.* v. *NLRB*, *supra*, and *NLRB* v. *Staten Island Hotel Ltd. Partnership*, *supra*. Those decisions, however, actually support the propriety of the Board's restoration order. In *Systems Management*, the court approved the restoration of preexisting terms of employment as part of the backpay remedy for the predecessor's employees who were improperly denied jobs. 901 F.2d at 307-308. The court merely refused to extend the remedy to the employees hired in their stead who were not financially injured by the discrimination against the former employees, *ibid.*, and declined to order compliance with the backpay award

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[5] The same distinction applies to *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873 (2d Cir. 1977). The court held in that case that a successor employer that had originally indicated an intent to retain the predecessor's employees, without stipulating new employment terms, had not clearly indicated an intention to be bound by the predecessor's terms and thus was free unilaterally to change those terms. *Id.* at 881-882. Petitioner seems to suggest (Pet. 20) that *Nazareth Regional High School* is similar to the present case because it involved "inherently coercive" Section 8(a)(1) violations, 549 F.2d at 878-879. That comparison is unsound. The unfair labor practices at issue in that case are not the equivalent of a discriminatory hiring scheme to evade bargaining, which provided the basis for the particular form of relief that the Board provided here. The same is true of the unlawful Section 8(a)(2) assistance to a rival union in *Burns*, 406 U.S. at 276, on which petitioner also relies (Pet. 16).

until the Board had determined the duration of the backpay period and the specific amounts of back pay due, *id.* at 308-309. In *Staten Island*, the court of appeals affirmed the same type of "temporally limited" restoration order that the Board employed in this case. Compare *Staten Island*, 101 F.3d at 862, with Pet. App. 17.

Petitioner also relies on the dissenting opinion in *U.S. Marine Corp.*, 944 F.2d at 1327-1331. Significantly, the dissent acknowledged that the Board could resolve against the wrongdoing employer "all factual ambiguities created by its illegal conduct," 944 F.2d at 1329, but concluded, on the facts of that case, that it was "unimaginable" that the employer would have agreed to use the preexisting terms. *Id.* at 1330. In this case, by contrast, the court of appeals found the record "devoid" of evidence that petitioner "would not have agreed to the [predecessor's] wage scale" had it hired the predecessor's employees on a nondiscriminatory basis and bargained in good faith with the Unions about the employment terms. Pet. App. 15, 18.[6]

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[6] The dissent in *U.S. Marine* also concluded that the Board's order was a "penalty," rather than a remedy (944 F.2d at 1330), based on the Board's statement that the successor had "forfeited any right [it might] have had as a successor to impose initial terms." 293 N.L.R.B. 669, 672 (1989). No such language appears in the Board's decision here. Pet. App. 28-29, 84-88. In any event, the Board's statement in *U.S. Marine* is consistent with its holdings in this and like cases that, since the successor's unlawful conduct made it impossible to determine what terms the predecessor's employees would have received absent the successor's unlawful scheme to avoid bargaining with the union, it was necessary to return to the status quo ante and send the parties to the bargaining table. The majority

3. Petitioner's contention (Pet. 21-23) that the Board's approach in this case will inhibit business transfers is without merit. The Board's approach does not raise "enormous practical obstacles for employers attempting to revitalize failing businesses or compete with uncompetitive ones" (Pet. 21). A new employer is free to offer its new employees the initial terms it chooses and to hire the employees it chooses, so long as it does not engage in illegal activity. The remedy at issue in this case comes into play only in the unusual situation in which the employer unlawfully discriminates against its predecessor's employees. The holding does not imperil lawful business transfers; it simply addresses the unique remedial problems raised when an employer such as petitioner embarks on a calculated scheme to evade bargaining with a union through discriminatory refusals to hire.

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of the court in *U.S. Marine* so understood the Board's rationale. 944 F.2d at 1322-1324.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

NEW BREED LEASING CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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* Petitioner's statement required by Rule 29.6 appears at page ii of the Petition for Writ of Certiorari.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for writ of *certiorari* demonstrated that the Ninth Circuit majority's enforcement of the Board's decision imposing a predecessor's terms and conditions of employment upon a successor/competitor violates this Court's holdings in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). To downplay that court's departure from these controlling precedents and the conflict in the courts of appeals, the Board responds with the uncritical argument that the Ninth Circuit's holding is simply a "temporally limited" remedial restoration of the *status quo ante*. (Opp., p. 8). Every element of the Board's argument is wrong: not only is the imposition of such terms not remedial, it is also neither a restoration of the *status quo ante* nor "temporally limited." Rather, the Board's effort to punish by imposing contractual terms that are its "best estimation" (Opp., p. 9) of what the parties would have agreed to absent New Breed's violations of the Act is an effort to aquire punitive authority that the statute and this Court have explicitly denied to the Board.[1]

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[1] The Board has recently been rebuffed by lower courts in its attempts to impose other punitive remedies on employers as well. *"Automatic" Sprinkler Corp.* v. *NLRB*, 120 F.3d 612, 618-19 (6th Cir. 1997) (relying indirectly on *H.K. Porter* in reversing Board bargaining and back pay order imposed for subcontracting work after collective bargaining agreement is terminated); *Unbelievable, Inc.* v. *NLRB*, 118 F.3d 795, 805-06 (D.C. Cir. 1997) (reversing as punitive Board award of attorney's fees to charging party participating in litigation).

1. As this Court's holdings make clear, the Board is granted the power to remedy violations of the Act under § 10(c), but it is denied the power to punish, especially to punish by imposing specific contractual terms upon employers or employees in contravention of § 8(d). *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953); *H.K. Porter*, 397 U.S. at 105-08 (citing, *inter alia*, the legislative history of the Act). Respondent seeks to skirt these settled principles by distinguishing *H.K. Porter* and *Burns* on two formalistic bases: first, that the Board imposed all of New Breed's predecessor's contractual terms of employment upon New Breed without explicitly imposing the predecessor's contract upon New Breed (Opp., p. 7), and, second, that this case involves violations of a subsection of § 8(a) of the Act different from the subsections at issue in *H.K. Porter* and *Burns*. (Opp., p. 12 n.5). Far from providing reasons to deny review, the Board's arguments illustrate why the Ninth Circuit's holding contravenes fundamental NLRA purposes and principles.

The Board suggests that the limitations on its power recited in *H.K. Porter* and *Burns* do not apply to this case because, in those cases, the Board sought to impose a contract on the employer, while here it only seeks to impose contract terms. Nothing in *H.K. Porter* or *Burns* supports the Board's formalistic argument; quite the opposite, it is long settled that courts must assess the practical effect of the Board's action, not the label that the Board attaches to it. *NLRB* v. *American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952) (it is "clear that the Board may not, *either directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (emphasis added)).

Especially because the Board seeks to impose the predecessor's terms of employment for three and one-half years (April 1, 1994 to present) – the predecessor's agreement (through the PMA) with the Union would have expired after twenty-seven months – there is no practical difference between imposing the predecessor's contract terms and the predecessor's contract.[2] *H.K. Porter, Burns,* and NLRA §§ 8(d) and 10(c) foreclose the Board's argument.

The Board's failure to address the holdings of *H.K. Porter* and *Burns* directly is best understood and explained by its premise that, for remedial purposes, there is a distinction between remedies available for violations of §§ 8(a)(1), (2), and (3). (Opp., p. 12 n.5). The Board's distinction is based on its notion, nowhere supported by the statute, that discriminatory refusal to hire cases brought under § 8(a)(3) seek to remedy more egregious misconduct than that addressed by the other subsections of § 8(a). (Opp., pp. 9-10). Those statutory provisions, however, which proscribe various employer

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[2] In an earlier similar situation, the Ninth Circuit found:

> This court [in an earlier case] refused to enforce [an order imposing a predecessor's terms of employment] because enforcement would, in effect, cause the successor employer to be bound by its predecessor's collective bargaining agreement for the three and one-half years that the successor owned the company, a period longer than the contract period in the union's agreement with the predecessor. We also believe that to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty.

Kallmann v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981).

activities as unfair labor practices, do not address the type of remedy the Board is authorized to seek. There is no justification for the Board's proposed distinction – any violation of any subsection of § 8(a) can be remedied (as appropriate) under § 10(c) by any non-punitive remedy not violative of § 8(d), but those remedies have never included the imposition of substantive contract terms.

The fallacy of the Board's effort to calibrate its remedial powers based on the perceived seriousness of the violations at issue is made clear by *H.K. Porter* and *Burns*. In *H.K. Porter*, the employer wrongfully refused to bargain collectively over a dues "checkoff" provision. Although a union was certified in 1961, the employer prevented the making of a collective bargaining agreement for over eight years by refusing to allow union dues to be checked off. *H.K. Porter*, 397 U.S. at 100. As the court of appeals found *twice* (once on the merits and once in contempt proceedings), had the employer bargained in good faith and not violated the Act, it would have agreed to the checkoff provision. *Id.* at 107 ("The Board had found that the refusal [to agree to a proposed checkoff provision] was based on a desire to frustrate agreement and not on any legitimate reason."). Despite the employer's flagrant § 8(a)(5) violations, this Court refused to uphold the Board's imposition of the checkoff provision pending further bargaining because that imposition would be punitive. *Id.* at 106.

Similarly, this Court in *Burns* rejected the Board's imposition of a predecessor's contract on a successor despite the successor's § 8(a)(2) violations at least as destructive to employee interests as the § 8(a)(3) discriminatory refusal to hire violations found here. In *Burns*, the

employees in the unit had only recently voted to be represented by a union, whereupon that union had negotiated a contract on their behalf with Burns' predecessor. *Burns*, 406 U.S. at 274-75. Burns, however, coerced the same employees into signing authorization cards for a different union (the AFG) of *its* choice, then promptly proceeded to sign a new and different contract with that union. For example, as the administrative law judge found in *Burns*, "Foley [one of Burns's agents] repeatedly pushed an AFG authorization card in front of Ware [an employee] and told him the Union was out and that he had to sign the AFG card or not work for respondent." *William J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348, 353 (1970), *rev'd in part sub nom. NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). Despite these flagrant § 8(a)(2) violations, this Court reversed the Board's imposition of the predecessor's terms of employment on the employer pending the outcome of bargaining. It found that the new employer could not be said (logically or legally) to have "*changed* unilaterally" any pre-existing terms when it set the initial terms and conditions of employment – it had "no previous relationship whatsoever to the bargaining unit." *Burns*, 406 U.S. at 294.[3]

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[3] See also *Nazareth Regional High Sch.* v. *NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977) (flagrant § 8(a)(1) violations do not empower Board to require forfeiture of employer's right to set initial contract terms); *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-08 (3d Cir. 1990) (§ 8(a)(2), (3), and (5) violations do not empower Board to impose predecessor/competitor's contract on successor with regard to new hires because "there was no 'situation' . . . to which the [new hires] could be restored" and Board order "must be considered a punitive measure, and hence not enforceable"); see Pet. at 17-23 (collecting cases).

Here – while petitioner (as in *Burns*) does not ask this Court to overturn the underlying unfair labor practice findings – the Board's effort to expand its remedial powers to include punitive measures cannot be defended by arguing that the harms to employee choice are qualitatively worse than in *H.K. Porter* or *Burns*. The Board's case against petitioner rested on its inference that a discriminatory refusal to hire occurred when New Breed did not interview the predecessor's employees, since if it had done so (again relying on inference) the predecessor's employees would necessarily have been hired, and that (once more relying on inference) New Breed would then have agreed to the same contract that its predecessor had in force. By resort to these cumulative inferences, the Board found a duty on New Breed's part to honor the terms of the predecessors's contract unless and until it could bargain something else with the predecessor's union. New Breed's activities may have violated the NLRA, but under *H.K. Porter* and *Burns* they do not provide a reasoned basis for expanding the remedial powers conferred by § 10(c).

2. It is also clear that the Board's imposition of New Breed's predecessor's (and competitor's) terms of employment was not a restoration of the *status quo ante*. Prior to April 1, 1994, New Breed did not employ anyone at the Compton facility – its competitor, Maersk, did. Indeed, under *Burns* (ignored by the Board) and *Spruce Up* (misconstrued by the Board), New Breed would have been free to set any initial terms and conditions of employment that it chose had no unfair labor practices

occurred. *Burns*, 406 U.S. at 294-96; *Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enforced without opinion sub nom. NLRB* v. *Spruce Up. Corp.*, 529 F.2d 516 (4th Cir. 1975). If its goal actually were to restore the *status quo ante*, the Board therefore would have determined that bargaining was to begin from the terms and conditions of employment that New Breed actually established for the employees it did hire.[4] Such a remedy, coupled with its order that discriminatees be reinstated, fulfills the mandates of the Act to the limit of the Board's power.

Instead, the Board seeks to impose terms of employment that are *its* "best estimation" of the substantive results of the bargaining that would have occurred in the absence of unfair labor practices. (Opp., p. 9). *H.K. Porter* and *Burns*, however, foreclose the Board from making any such "estimates" of what contract terms should be. The Board is not empowered to regulate or determine the substantive results of bargaining; it is entitled only to govern the procedural aspects of such bargaining. *H.K. Porter*, 397 U.S. at 107-08. As this Court has repeatedly found, anything more is impermissible and punitive. See, e.g., *Seven-Up Bottling*, 344 U.S. at 346-47.

3. The Board also seeks to minimize its error by casting its imposition of terms as a "temporally limited"

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[4] The Board takes the same inexplicable position as the Ninth Circuit, that is, that the record is allegedly "devoid" of evidence that petitioner "would not have agreed to the [predecessor's] wage scale" (Opp., p. 13; *id.* at 9). On the contrary, the record is clear that New Breed set initial terms markedly different from the "[predecessor's] wage scale" (Pet., p. 6 n.2).

remedy. But § 8(d) does not merely prohibit the permanent imposition of substantive contract terms – it prohibits the imposition of *any* substantive contract terms. The Board attempted to broaden its powers in the same manner almost three decades ago (in *H.K. Porter* and *Burns*) by characterizing the imposition both as a remedy for contempt and as a remedy for unfair labor practices. In both situations, this Court refused to adopt the Board's suggested approach. The passage of time has not improved the statutory basis for the Board's approach or made it any less punitive.

The Board's further claim that the Ninth Circuit's decision does not conflict with decisions of other courts of appeals is based on the fallacious position that the imposition of substantive contract terms is "temporally limited." The only temporal limitations on the terms imposed by the Ninth Circuit are the eventual exhaustion of New Breed's right to review and the progress of the collective bargaining process. In contrast, the Sixth and (in a different case) Ninth Circuits have suggested a truly "temporally limited" approach. In *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (6th Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988), and *Kallmann* v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981), the respective courts of appeals suggested that the Board estimate the time in which the employer and union would have negotiated, either to agreement or to impasse, and limit the imposition of the predecessor's substantive contract terms to that hypothetical bargaining period.[5]

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[5] While the approach in *Armco* and *Kallmann* prevents the employer from being punished for exercising its due process

4. Petitioner recognizes, of course, that this Court may not wish to follow its decisions in *H.K. Porter* or *Burns* here; the Court may wish to adopt a new interpretation of the law or distinguish between unfair labor practices under different subsections of § 8(a). But that is precisely why a writ of *certiorari* should issue. It is vitally important for this Court to resolve the conflict in the courts of appeals, and to clarify either that the rules of *H.K. Porter* and *Burns* still apply or that this Court would now reach a different result in some or all types of cases.

CONCLUSION

For the foregoing reasons and those set forth in the petition for writ of *certiorari*, the Court should grant the petition for writ of *certiorari* and give the case plenary consideration.

Respectfully submitted,

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rights, it does not cure the revocation of the employer's right to set initial terms. Those cases thus still conflict with *H.K. Porter* and *Burns*.